06-1271

Supreme Court, U.S.
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No. ____

IN THE

Supreme Court of the United States

FREEEATS.COM, INC.,

Petitioner,

v.

STATE OF NORTH DAKOTA
EX REL. WAYNE STENEHJEM,
ATTORNEY GENERAL,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH DAKOTA

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Is North Dakota Century Code § 51-28-02, which restricts the making of prerecorded telephone calls to residents of that State, preempted by the Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, 105 Stat. 2394 (1991), and the implementing rule adopted by the Federal Communications Commission, 47 C.F.R. § 64.1200(a)(2)(ii) (2005), as applied to prerecorded interstate telephone calls that seek to survey the recipient's political views?

STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Petitioner, FreeEats.com, is a privately-held company doing business as ccAdvertising. No publicly held company holds 10% or more of the stock of FreeEats.com.

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PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the Supreme Court of North Dakota was issued on April 21, 2006 and is reported at 712 N.W.2d 828 (2006). (App., *infra*, 1a). The decision of the District Court for Burleigh County is not reported. (App., *infra*, 27 a).

JURISDICTION

The Supreme Court of North Dakota entered its judgment on April 21, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THIS CASE

The Supremacy Clause of the United States Constitution, Art. VI, cl. 2, and relevant provisions of the Communications Act of 1934 and the North Dakota Century Code are set forth in the Petition Appendix.

STATEMENT

This case concerns whether a North Dakota statute that makes it illegal to make prerecorded interstate telephone calls to residents of that state for political polling purposes is preempted by a rule issued by the Federal Communications Commission under the Telephone Consumer Protection Act of 1991 (the "TCPA"), Pub. L. No. 102-243, 105 Stat. 2394 (1991) (codified at 47 U.S.C. § 227), that permits such calls.

Telephones are an important instrument in political campaigns. Petitioner FreeEats.com is a survey and database company that relies upon interactive-voice-response and speech-recognition technology on outbound calls using prerecorded messages to query households through survey polls, identify supporters, and later encourage those supporters to turn out to vote. The company has used this technology in many political campaigns and initiatives, including campaigns in the State of North Dakota in the 2004 elections.

1. The Telephone Consumer Protection Act

Section 2(a) of the Communications Act of 1934 authorizes the FCC to regulate interstate telephone calls. It provides, in pertinent part:

> The provisions of this chapter shall apply to all *interstate* and foreign communications by wire or radio . . . .

47 U.S.C. § 152(a) (emphasis added). Section 2(b) of the Act further provides:

> *Except as provided in sections 223 through 227* of this title, inclusive, . . . nothing in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with *intrastate* communication service by wire or radio of any carrier . . . .

47 U.S.C. § 152(b) (emphasis added). These two provisions have long established the basic structure of telephone regulation in the United States. The FCC generally has exclusive jurisdiction to regulate interstate calls, while the States generally have authority to regulate intrastate calls. *See, e.g., City of New York v. FCC*, 486 U.S. 57 (1988).

In 1991, Congress adopted the TCPA, which amended the Communications Act to make it unlawful to place certain types of telemarketing calls, whether interstate or intrastate in nature, and authorized the FCC to grant exemptions from these restrictions under certain circumstances.

The TCPA did not amend Section 152(a), governing FCC regulation of interstate calls, but did amend Section 152(b), concerning State jurisdiction over intrastate communications, through the introductory phrase "Except as provided in sections 223 through 227 of this title." *See* Pub. L. No. 102-243, § 3(b), 105 Stat. 2401.

In adopting the TCPA, Congress made two findings that are relevant to this case. Section 2(7) of the TCPA, 105 Stat. 2394, provides:

> Over half the States now have statutes restricting various uses of the telephone for marketing, but telemarketers can evade their prohibitions through interstate operations; therefore, Federal

> law is needed to control residential telemarketing practices.

Further, Section 2(13), 105 Stat. 2395, provides:

> While the evidence presented to the Congress indicates that automated or prerecorded calls are a nuisance and an invasion of privacy, regardless of the type of call, the Federal Communications Commission should have the flexibility to design different rules for these types of automated or prerecorded calls that it finds are not considered a nuisance or invasion of privacy, or for noncommercial calls, consistent with the free speech protections embodied in the First Amendment of the Constitution.

To provide the federal law "needed to control residential telemarketing practices," Congress enacted Section 227(b) of the Communications Act, which provides:

> It shall be unlawful for any person within the United States — . . .
>
> (B) to initiate any telephone call to any residential telephone line using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party, unless the call is initiated for emergency purposes or is exempted by rule or order by the Commission under paragraph (2)(B).

47 U.S.C. § 227(b)(1)(B). The phrase "any telephone call" establishes federal jurisdiction over defined categories of both intrastate and interstate telemarketing calls.

To implement the finding in Section 2(13), Congress adopted Section 227(b)(2)(B), 47 U.S.C. § 227(b)(2)(B), which provides, in pertinent part:

> In implementing the requirements of this subsection, the Commission – . . .

> (B) may, by rule or order, exempt from the requirements of paragraph (1)(B) of this subsection, subject to such conditions as the Commission may prescribe –
>
> > (i) calls that are not made for a commercial purpose . . . .

The TCPA also contained a saving clause, 47 U.S.C. § 227(e)(1), incorporated into Section 152(b). It provides:

> (1) State law not preempted
>
> Except for the standards prescribed under subsection (d) of this section and subject to paragraph (2) of this subsection, nothing in this section or in the regulations prescribed under this section shall preempt any State law that imposes more restrictive intrastate requirements or regulations on, or which prohibits – . . .
>
> > (C) the use of artificial or prerecorded voice messages; . . . .

The issue in this case is whether this provision authorizes the States to restrict interstate telemarketing calls that the FCC permits.

2. FCC Implementation of Section 227(b)(2)(B).

In 1992, the FCC exercised the authority granted by Congress in Section 227(b)(2)(B) and adopted a rule that exempted all prerecorded calls made for a noncommercial purpose from the prohibition that otherwise would apply.[1] 47 C.F.R. § 64.1200(a)(2)(ii) (2005) provides:

> (a) No person or entity may: . . .

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[1] *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Report and Order*, 7 FCC Rcd 8752 (1992) ("*1992 Report and Order*").

> (2) Initiate any telephone call to any residential line using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party, unless the call: . . .
>
> (ii) Is not made for a commercial purpose . . . .

In creating this exemption, the FCC stated:

> We find that the exemption, for non-commercial calls from the prohibition on prerecorded messages to residences includes calls conducting research, market surveys, *political polling* or similar activities which do not involve solicitation as defined by our rules.

1992 Report and Order ¶ 41 (emphasis added).

Since 1992, many States have adopted laws that restrict telemarketing calls to their residents, including calls with prerecorded messages. Many of these statutes apply to both interstate and intrastate calls, without distinction.

In July 2003, the FCC issued a rule to establish a nationwide Do Not Call Registry for telemarketing calls and to make a number of other changes to its telemarketing regulations.[2] In that rulemaking, the FCC expressly reaffirmed the exemption for prerecorded, noncommercial calls. It also considered the proliferation of State laws that purported to regulate interstate telemarketing calls.

The FCC concluded that in enacting the TCPA, "it was the clear intent of Congress generally to promote a uniform regulatory scheme under which telemarketers would not be subject to multiple, conflicting regulations." *2003 Report and Order* ¶ 83. It found that the TCPA preserved for the States authority to impose more restrictive

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[2] *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Report and Order*, 18 FCC Rcd 14014 (2003) ("*2003 Report and Order*").

requirements on *intrastate* telemarketing calls. *Id.* ¶ 82. The Commission further concluded, based on the rulemaking record, "inconsistent interstate rules frustrate the federal objective of creating uniform national rules, to avoid burdensome compliance costs and potential consumer confusion." *Id.* ¶ 83.

> [A]ny state regulation of interstate telemarketing that differs from our rules *almost certainly* would conflict with and frustrate the federal scheme and *almost certainly* would be preempted.

Id. ¶ 84 (emphasis added).

3. The State Enforcement Action Against FreeEats.com

In 2003, North Dakota enacted a law that, with exceptions not relevant here, restricts prerecorded calls to its residents. N.D. Cent. Code § 51-28-02 provides, in pertinent part:

> A caller may not use or connect to a telephone line an automatic dialing-announcing device unless the subscriber has knowingly requested, consented to, permitted, or authorized receipt of the message or the message is immediately preceded by a live operator who obtains the subscriber's consent before the message is delivered. . . .

This law applies to both interstate and intrastate calls and does not differentiate between commercial and noncommercial calls, if they are prerecorded. Each call placed in violation of the statute is a separate violation, subject to a civil money penalty of $2,000. *Id.* §§ 51-28-17 & -19.

In August 2004, FreeEats.com placed numerous prerecorded telephone calls from its call center in Ashburn, Virginia to residences in North Dakota. The calls sought to determine the recipient's views on issues that were relevant to the 2004 elections. (App. 4a-5a).

On September 17, 2004, the Attorney General of North Dakota brought this enforcement action against FreeEats.com, seeking civil money penalties for violation of Section 51-28-02 by these prerecorded calls. (App. 5a).[3] The company potentially faced many millions of dollars in penalties, due to the large number of political polling calls involved.[4]

In the trial court, FreeEats.com argued that the State statute directly conflicted with the TCPA and the FCC's implementing rule, insofar as applied to prerecorded interstate political polling calls, and thus was preempted by the Supremacy Clause. (App. 28a). The court concluded that Section 51-28-02 was not preempted and that these interstate calls to North Dakota residents were illegal. (App. 29a-33a). The court imposed a civil money penalty of $10,000, plus attorney fees and costs. (App. 5a).

On appeal, the Supreme Court of North Dakota affirmed. It held that federal law did not preempt application of Section 51-28-02 to prerecorded, interstate political polling calls, based on the saving clause of the TCPA. (App. 26a). The court rejected FreeEats.com's argument that its interpretation of the saving clause should be governed by *United States v. Locke*, 529 U.S. 89 (2000), which concluded that a State is not entitled to an "assumption" of nonpreemption when it regulates in an area with a history of significant federal presence. Rather, the court assumed that Congress did not intend to preempt the State's police power and required the company to bear

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[3] Earlier in 2004, the State invoked the statute against the campaign of General Wesley Clark for having used prerecorded messages in a presidential primary election. *See Attorney General Looks into Clark Calls, Bismarck Tribune*, Jan. 24, 2004.

[4] In filings with the FCC, FreeEats.com stated that it had attempted to call each of the 235,000 households in North Dakota with a publicly-available, listed telephone number. *In the Matter of ccAdvertising*, Petition for Expedited Declaratory Ruling, FCC, CG Docket No. 02-278, filed Sept. 13, 2004.

the "burden of proving it was the clear and manifest intent of Congress to supersede state law." (App. 16a (citing *Bates v. Dow Agrosciences LLC*, 125 S. Ct. 1788, 1801 (2005), and *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992), and other cases)).

In interpreting the saving clause, the court focused on the word "or" preceded by a comma, which separated the phrase "more restrictive intrastate requirements or regulations" from the phrase "which prohibits." It concluded that the use of the disjunctive "or," preceded by a comma, indicates that the word "intrastate" in the first clause does not modify the second clause. (App. 10a-11a). The court therefore held that while the State might not be able to regulate prerecorded, interstate political polling calls to North Dakota residents, it had authority to prohibit such calls. (App. 11a-12a).[5]

REASONS FOR GRANTING THE PETITION

This case presents an important question of law that has not been, but should be, decided by this Court concerning the respective authorities of the federal government and the States to regulate prerecorded, interstate telephone calls.

The decision of the Supreme Court of North Dakota conflicts with this Court's decisions in *United States v. Locke*, 529 U.S. 89 (2000), and *City of New York v.* FCC, 486 U.S. 57 (1988), which establish the principles governing preemption of a State law that applies to interstate

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[5] The court also noted in passing that the TCPA preserves the ability of a state to bring actions in its courts for violation of any general civil or criminal statute." (App. 21a (quoting 47 U.S.C. § 227(f)(6))). The court did not hold that Section 227(f)(6) was an independent basis for its decision; rather, it cited this provision in finding that the TCPA did not preempt the field of telemarketing regulation. In any event, there is no basis for a claim that Section 227(f)(6) provides a *second* basis for ignoring a valid FCC rule adopted pursuant to Section 227(b).

telephone service, an area long regulated at the federal level.

As applied to the calls made by FreeEats.com, N.D. Cent. Code § 51-28-02 conflicts with the FCC's rule that permits prerecorded, noncommercial interstate calls and impairs the FCC's authority to establish uniform, nationwide standards in this networked industry. The decision of the North Dakota court also frustrates the decisions made by Congress and the FCC about the appropriate balancing of consumer privacy interests and the important First Amendment rights that attach to noncommercial speech communicated through these calls.

Since 1934, Congress generally has given the FCC regulatory authority over interstate calls and has reserved regulation of intrastate calls to the States. In the TCPA, Congress did not change this basic structure; it did not amend the provision of the Communications Act that establishes the FCC's authority over interstate calls. Congress did, however, amend Section 152(b) to extend federal jurisdiction over certain categories of intrastate telemarketing calls that previously had been fenced off from federal regulation. The FCC subsequently exercised the specific authority delegated to it by Congress to permit prerecorded interstate calls for noncommercial purposes, including calls for political polling purposes.

The North Dakota court erred in upholding the State law as applied to punish Petitioner for making prerecorded interstate calls that are permissible under federal law. In reaching this conclusion, the court ignored the structure of the Communications Act and the substantive provisions of the TCPA. It also ignored the FCC's conclusion that State statutes conflicting with its TCPA rule "almost certainly" would frustrate the federal interest and "almost certainly" would be preempted. *2003 Report and Order* ¶ 84.

Instead, the court undertook a purported "plain language" interpretation of the TCPA saving clause, divorced from its context. (App. 7a). It applied an "assumption" about the operation of conflict preemption principles that is inconsistent with *Locke* and other decisions of this Court concerning the interpretation of a saving clause in a field long subject to federal regulation. Starting from these erroneous premises, the court misinterpreted the saving clause which, properly construed, limits the extension of federal authority to regulate *intrastate* calls, an area previously "fenced off" from federal jurisdiction. The court improperly converted the saving clause into a mechanism that allows the States to invade the exclusive authority of the FCC to regulate *interstate* calls. This decision directly conflicts with the FCC rule and frustrates the federal interest.

The question of the respective authorities of the FCC and the States to regulate prerecorded, noncommercial interstate calls is an important and recurrent legal issue that warrants review by the Court at this time. Many States have adopted laws that conflict with various provisions of the FCC's TCPA regulations, including its rule that permits prerecorded interstate polling calls, and have justified their statutes based on the TCPA saving clause.

These conflicting and overlapping State laws threaten the existence of the uniform, national standards for interstate calls that Congress and the FCC believe are essential in this networked industry. In addition to frustrating the federal purposes, these laws impose substantial burdens on telemarketers in conducting interstate activities clearly authorized by the FCC's regulations. Even when acting in compliance with federal law, telemarketers may face substantial *in terrorem* threats from state regulation, such as the hundreds of millions of dollars in civil penalties to which Petitioner was exposed.

This case presents an appropriate vehicle in which to resolve this legal question. The decision below is a final judgment in an enforcement action. There are no threshold questions of standing or ripeness and no disputed questions of fact that might interfere with the Court's ability to reach the merits of the issue.

Further, the question is presented in the context of North Dakota's prohibition of prerecorded, noncommercial interstate political polling calls. The chilling effect of that decision on political speech demonstrates both the practical significance of the legal issue and the importance of the Congressionally-directed balancing of First Amendment and consumer interests that the FCC made in determining that these calls should be permitted.

The Supreme Court of North Dakota explicitly declined to follow the decision of the only federal court that has considered whether the TCPA saving clause avoids preemption of State laws that conflict with the statute as applied to interstate calls. (App. 26a (declining to follow *Chamber of Commerce v. Lockyer*, 2006 WL 462482 (E.D. Cal. Feb. 26, 2006))). Instead, it adopted the erroneous interpretation of the saving clause devised by the Supreme Court of Utah in a case involving the regulation of prerecorded commercial interstate calls. (*Id.* (citing *Utah Div. of Consumer Prot. v. Flagship Capital*, 125 P.3d 894 (Utah 2005))). Accordingly, this important legal issue is appropriately framed for resolution by the Court at this time.

I. THE DECISION OF THE SUPREME COURT OF NORTH DAKOTA IS ERRONEOUS AND CONFLICTS WITH PRIOR DECISIONS OF THIS COURT.

Under the Supremacy Clause, any state legislation that burdens or conflicts with a federal law is invalid. U.S. Const. art VI, cl. 2. A state law conflicts with federal law if it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *E.g.*, *Geier v. American Honda Motor Co.*, 529 U.S. 861, 873 (2000). The statutorily authorized regulations of a federal agency preempt any state law that conflicts with those rules or would frustrate accomplishment of their purposes. *City of New York v. FCC*, 486 U.S. 57, 64 (FCC rule implementing statutory authority to establish technical standards for cable television signals preempts more stringent local requirements).

The North Dakota statute restricts prerecorded, noncommercial interstate telemarketing calls and squarely conflicts with the FCC's rule permitting such calls. The Supreme Court of North Dakota nonetheless held that the State statute was not preempted by the FCC regulation. That decision is erroneous. It conflicts with prior decisions of this Court that have recognized exclusive federal jurisdiction to regulate interstate calls and cases that determine the proper interpretation of a saving clause in a preemption challenge to a conflicting State law in an area, like telephone service, where the federal government exercises pervasive regulatory authority.

A. Prerecorded Interstate Political Polling Calls Are Permitted by FCC Regulation.

In adopting the TCPA, Congress acted against a background of federal preemption of State laws governing interstate calls. *See City of New York*, 486 U.S. at 66 (preemption found where Congress "acted against a background of federal pre-emption on this particular issue").

Since 1934, the FCC generally has exercised exclusive regulatory authority over interstate telephone calls, and the States generally have regulated intrastate calls. This division of authority is reflected in the jurisdictional provisions of the Communications Act. Section 152(a) provides that the FCC's authority "shall apply to all interstate and foreign communications by wire or radio . . . .." Section 152(b) further provides that "[e]xcept as provided in sections 223 through 227," the FCC shall not have "jurisdiction with respect to . . . intrastate communication service."

Section 152(b) generally has the effect of "fenc[ing] off from FCC reach or regulation" matters in connection with intrastate service. *See Louisiana Public Service Comm'n v. FCC*, 476 U.S. 355, 382-83 (1986). Congress has, from time to time, amended this provision and granted the FCC jurisdiction over intrastate activities that previously were regulated by the States.[6]

The TCPA did not amend Section 152(a) governing FCC authority over interstate calls. Rather, Congress again amended Section 152(b) in a manner that expanded federal jurisdiction and limited the previously existing State authority over intrastate calls. This revision implemented the Congressional finding in Section 2(7) that an expansion of federal authority was necessary in order to control residential telemarketing practices. 105 Stat. 2394.[7] Neither the findings nor the substantive provisions of the TCPA contain any suggestion that Congress intended to expand State authority over interstate calls.

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[6] *See AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366 (1999) (local competition provisions of the Telecommunications Act of 1996 extended federal authority to intrastate matters previously regulated by the States).

[7] The legislative history of the TCPA confirms that Congress intended to give the FCC jurisdiction over some intrastate calls but contains no indications that Congress intended to give the States jurisdiction over interstate calls. *See* S. Rep. No. 102-178, at 3 (1991).

Section 227(b)(1) generally prohibits all prerecorded interstate or intrastate telemarketing calls without the consent of the recipient, unless the FCC specifically exempts a type of prerecorded call under Section 227 (b)(2). Section 227(b)(2)(B) provides in turn that the FCC "may, by rule or order, exempt from the requirements of paragraph (1)(B) . . . (i) calls that are not made for a commercial purpose . . . ." This provision implements the Congressional finding in Section 2(13) that the FCC should have the flexibility to design different rules for noncommercial calls, "consistent with the free speech protections embodied in the First Amendment of the Constitution." 105 Stat. 2395.

Section 227(b)(2) thus explicitly provides the FCC with authority to adopt rules governing the legality of prerecorded noncommercial calls. *See AT&T Corp.*, 525 U.S. at 377-78. The FCC exercised that power by adopting a rule, 47 C.F.R. § 64.1200(a)(2)(ii). It exempts all noncommercial calls from the otherwise applicable statutory prohibition on prerecorded calls. The FCC expressly found that political polling calls were exempt from the prohibition on prerecorded calls. *1992 Report and Order* ¶ 40.

In 2003, the FCC conducted a further rulemaking that addressed its authority over interstate telemarketing calls. *2003 Report and Order* ¶¶ 82-84. The FCC stated that "any state regulation of interstate telemarketing calls that differs from our rules almost certainly would conflict with and frustrate the federal scheme and almost certainly would be preempted." *Id.* ¶ 84.

In sum, the TCPA modified the allocation of regulatory responsibility over telephone calls in one direction only: by expanding federal jurisdiction. Nothing in the statutory findings or the substantive provisions of the TCPA suggests that Congress altered the jurisdictional boundary in the other direction. The TCPA did not give

the States authority to regulate any interstate telemarketing calls. In particular, it did not amend Section 152(a) in any respect.

The prerecorded interstate interactive-voice-response and speech-recognition political polling calls made by FreeEats.com to North Dakota residents fall within the exemption created by 47 C.F.R. § 64.1200(a)(2)(ii) and therefore are permitted under federal law.

B. The Saving Clause of the TCPA Does Not Authorize North Dakota To Regulate Prerecorded Noncommercial Interstate Calls.

The TCPA saving clause, Section 227(e)(1), provides, in pertinent part:

> Except for the standards prescribed under subsection (d) of this section and subject to paragraph (2) of this subsection, nothing in this section or in the regulations prescribed under this section shall preempt any State law that imposes more restrictive intrastate requirements or regulations on, or which prohibits – . . .
>
> (C) the use of artificial or prerecorded voice messages . . . .

The interpretation of this provision adopted by the Supreme Court of North Dakota transformed Section 227(e)(1) into a mechanism that expands State authority to regulate interstate calls. That construction contradicts the structure of the Communications Act and conflicts with this Court's decisions governing the proper interpretation of a saving clause in an area of longstanding federal regulation.

The saving clause is inartfully drafted, and its language is ambiguous. What is clear is that the word "interstate" does not appear in Section 227(e)(1)(C). Nothing

in its text plainly grants the States jurisdiction over interstate calls. The more natural reading of this provision is that in extending federal authority, Congress accommodated the States by preserving more stringent local statutes governing intrastate calls.

The North Dakota court found that the language of Section 227(e)(1) was unambiguous (App. 10a-11a); this allowed it to avoid even mentioning, let alone addressing, the contrary FCC construction articulated in its 2003 rulemaking. *See United States v. Mead*, 533 U.S. 218, 226-27 (2001). To devise its "unambiguous" construction, the court had to introduce a grammatical error into Section 227(e)(1). Its reading, that the States may not restrict but may prohibit interstate calls, would deprive an entire phrase in the saving clause of meaning and would produce a result that is at odds with the longstanding history of telephone regulation. Indeed, under the logic of the court's own distinction between restrictions and prohibitions, the North Dakota statute still would not be saved.

In light of the ambiguity in Section 227(b)(1), its interpretation should be guided by the traditional tools used to help construe a statute, including its structure and context and its interpretation by the agency Congress charged with its implementation. The North Dakota court erred by ignoring these factors and by giving broad effect to the saving clause "where doing so would upset the careful regulatory scheme established by federal law." *Locke*, 529 U.S. at 106.

1. The Court Ignored the Structure of the Communications Act. The North Dakota court erred in interpreting Section 227(e)(1) as overturning the basic allocation of responsibility that has existed since 1934 and authorizing the States to regulate a category of interstate calls. The court ignored the critical fact that the TCPA did not amend Section 152(a), which generally provides the FCC

with exclusive regulatory jurisdiction over interstate calls, but amended only Section 152(b), to expand federal authority in an area – regulation of intrastate calls – that previously had been fenced off. This structural factor alone precludes an interpretation that the saving clause included in Section 152(b) accomplished a fundamental transformation in the regulatory scheme and authorized the States to regulate a category of interstate calls.

The text of the statute shows that Congress recognized a need for expansion of federal authority. Nothing in the findings or substantive provisions of the TCPA suggests that Congress intended to accomplish an abrupt shift in federal law by authorizing the States to regulate interstate calls.

2. The Court Applied an Improper Preemption Standard. The Supreme Court of North Dakota found that because the police powers of the State were involved, its analysis properly began with an "assumption" that Congress did not intend to abrogate a State statute implementing the police power and that the party claiming preemption bears "the burden of proving it was the clear and manifest intent of Congress to supersede state law." (App. 16a; *see id.* 15a). The court erred as a matter of law.

In *United States v. Locke*, 529 U.S. 89 (2000), the Court considered the proper interpretation of a saving clause that allegedly prevented conflict preemption of state regulations in an area – maritime commerce – long regulated by the federal government. Relying on its prior decision in *Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978), the Court concluded that "an 'assumption' of non-pre-emption is not triggered when the State regulates in an area where there has been a history of significant federal presence." *Id.* at 108.

The FCC has long regulated interstate telephone calls. Section 1 of the Communications Act, 47 U.S.C. §

151, charges the agency with ensuring efficient, nationwide phone service. *See Louisiana Public Service*, 476 U.S. at 370. Under these circumstances:

> [T]here is no beginning assumption that concurrent regulation by the State is a valid exercise of its police powers. Rather, we must ask whether the local laws in question are consistent with the federal statutory structure, which has as one of its objectives a uniformity of regulation . . . .

Locke, 529 U.S. at 108. Accordingly, the North Dakota court erred by applying the wrong preemption standard and improperly imposed a burden of proof on Petitioner.

3. The Court Erroneously Interpreted Section 227(e)(1). The Supreme Court of North Dakota found that Section 227(e)(1) contained two clauses that modify the object "any State law" – (1) "that imposes more restrictive intrastate requirements or regulations"; and (2) "which prohibits." The court focused on the comma, followed by the word "or" that separates these two clauses. It found that the comma followed by a disjunctive conjunction created two parallel and independent phrases, and thus two independent regulatory requirements. (App. 10a-11a).

The word "interstate" does not appear in Section 227(e)(1). The court supplied it by assuming that the presence of "intrastate" in the first clause, and its absence in the second parallel clause, must have meant that Congress intended to draw a distinction and to allow the States to prohibit interstate calls.

This court's interpretation is based on an obvious grammatical mistake. Section 227(e)(1) does not introduce both clauses with the word "that," as would be required to create parallel clauses. Rather, it uses two different words, "that" and "which" to introduce these provisions; literally interpreted, the clauses are not parallel.

The North Dakota court simply ignored Congress' actual choice of the word "which" and implicitly revised the text as if Congress had used the word "that" instead.

Due to the ambiguity in the language of the saving clause, it is difficult to develop a rational interpretation based on its plain language alone. The word "that" introduces a restrictive clause, and the word "which" signals a nonrestrictive clause. *The Chicago Manual of Style* § 5.42 (14th rev. ed. 1993). "Which" is "used as a relative pronoun in a clause that provides additional information about the antecedent." *Webster's II New College Dictionary* 1257 (1995).

The better view is that the antecedent of "which" is not "any State law," as the court assumed, but rather the entire phrase "any State law that imposes more restrictive intrastate requirements or regulations on the use of artificial or prerecorded messages." The clause introduced by "which" provides additional information about the kinds of measures that a State is permitted to adopt for intrastate calls – i.e., it may prohibit them as well as restrict them. The comma is necessary grammatically to separate "or which prohibits" from the phrase "requirements or regulations," in which two words already are joined by a disjunctive conjunction.

This interpretation follows the principle of giving meaning to Congress' use of the different words "that" and "which" to introduce the two clauses. *See TRW, Inc. v. Andrews*, 534 U.S. 19, 31 (2001). Thus, properly construed, the term "intrastate" applies to both clauses.

The North Dakota court's contrary interpretation of the saving clause produces absurd results. First, under its construction, States would have the lesser authority to impose "requirements or regulations" on intrastate calls, but would have the greater power to "prohibit" interstate calls. This outcome conflicts with the basic allocation of authority in the Communications Act, under which the

States may regulate intrastate calls but have no authority over interstate calls.

Second, even accepting the court's logic, the North Dakota statute would not qualify as a "prohibition," but rather would constitute a "requirement[] or regulation[]" that could only be imposed on intrastate calls. Section 51-28-02 does not in fact absolutely ban prerecorded calls. Rather, it restricts their use to situations in which a live operator is on the line to solicit consent. Accordingly, there are substantial reasons to believe that the court's interpretation is erroneous.

As a functional matter, the court's interpretation would have the first clause serve the true purpose of a saving clause – limiting the degree of intrusion of federal authority into a domain previously allocated to the States. However, it would make the second clause serve as an affirmative grant of power to the States, a delegation that is reflected nowhere else in the TCPA. In *Locke*, the Court cautioned against interpreting language in a saving clause in a manner that would upset a settled regulatory framework and allow the States to regulate matters long regulated by the federal government.

> We think it quite unlikely that Congress would use a means so indirect as the savings clauses . . . to upset the settled division of authority by allowing states to impose additional unique substantive regulation . . . . We decline to give broad effect to saving clauses where doing so would upset the careful regulatory scheme established by federal law.

Locke, 529 U.S. at 106.

By ignoring the other provisions of the statute and basing its construction on the presence of a comma, the Supreme Court of North Dakota ignored this Court's warning in *United States National Bank of Oregon v. In-*

dependent Insurance Agents of America, Inc., 508 U.S. 439 (1993):

> [T]he meaning of a statute will typically heed the commands of its punctuation. But a purported plain-meaning analysis based only on punctuation is necessarily incomplete and runs the risk of distorting a statute's true meaning. . . . No more than isolated words or sentences is punctuation alone a reliable guide for discovery of a statute's meaning.

508 U.S. at 454-455 (internal citation omitted).

In sum, the Supreme Court of North Dakota erred in interpreting the saving clause. In the structure of the Communications Act and the context of the TCPA, that provision limits the extent of the federal intrusion into the State sphere but does not grant the States authority to override FCC rules governing interstate calls.

The only federal court to have considered this issue held, in the context of commercial calls, that the TCPA saving clause does not authorize the States to regulate interstate communications. In *Chamber of Commerce v. Lockyer*, 2006 WL 462482 (E.D. Cal., Feb. 26, 2006), the court considered a conflict preemption challenge to a State law that imposed more stringent restrictions on interstate fax advertisements than federal law. Section 227 of the TCPA, as amended, permits a telemarketer to transmit unsolicited fax advertisements under certain conditions to recipients with which it has an established business relationship. A subsequently enacted California law required the sender to obtain express prior consent if either the transmitter or the recipient of the fax was in California. The State defended the law on the ground that the TCPA saving clause authorized it to prohibit interstate fax transmissions.

The court held that an interpretation of Section 227(e)(1) that would have the term "intrastate" modify the first phrase, but not modify "prohibit," would be irrational.

> If the savings clause is construed to preserve the right [of the States] to restrict both intrastate and interstate telecommunications, then the word "intrastate" places no constraint on the States' jurisdiction over telecommunications and the inclusion of the work "intrastate" would be surplusage. . . . [T]he Court believes that its duty to give each word some operative effect where possible precludes such a construction.

2006 WL 462482 at *8. The court correctly found that the word "intrastate" also modified "prohibits" and held the California law unconstitutional insofar as applied to interstate calls.

II. REVIEW OF THIS IMPORTANT LEGAL ISSUE IS WARRANTED.

The decision of the Supreme Court of North Dakota compromises the FCC's authority to regulate interstate telemarketing calls, by misinterpreting the TCPA saving clause to allow States to trump the uniform national standards that Congress intended to establish for interstate telephone calls. The Court should review this important legal issue at this time, in light of the adverse effects of the decision and the clear error in its reasoning, rather than waiting while the adverse effects of its decision ramify through the legal system and create further problems.

The North Dakota decision is being watched closely by Attorneys General and telemarketers. If the decision stands, it will create a chaotic situation in which interstate political polling and other non-commercial calls will be governed by a patchwork of overlapping and conflict-

ing State laws, undermining the goals of uniformity in regulating a networked industry and respect for political speech rights that Congress recognized in adopting the TCPA. These conflicting local consumer protection restrictions would make it difficult and expensive for political pollsters and campaigns to use interstate calls. Moreover, given the volume of calls involved, pollsters will be exposed to potentially enormous penalties if they run afoul of one of the non-uniform restrictions imposed by a single State.

Several States have adopted laws that subject prerecorded interstate telephone calls to more stringent requirements than the federal standards. For example, the Minnesota statute prohibiting prerecorded calls applies to both noncommercial and commercial calls and has been enforced against prerecorded political polling calls.[8] Arizona, Colorado, Georgia, New Mexico, North Carolina, and Texas also prohibit the use of pre-recorded messages for commercial solicitations without prior consent, even when the caller has an established business relationship with the consumer. These calls are permitted under the FCC's rules.[9]

The preemption issue has arisen in several other contexts, in which States have adopted laws that are inconsistent with or more stringent than the federal standards.

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[8] Minn. Stat. § 325E.27. In *Van Bergen v. State of Minnesota*, 59 F.3d 1541 (8th Cir. 1995), the Eighth Circuit upheld this statute against a preemption challenge by a candidate for Governor who sought to make *intrastate* political polling calls in support of his candidacy. The record before the Supreme Court of North Dakota demonstrated that the calls at issue in *Van Bergen* were intrastate in nature. Appellant's Reply Brief at 2-3 & Addendum.

[9] *See* Ariz. Rev. Stat. §§ 13-2919, 44-1278(B)(4) & (5); Colo. Rev. Stat. §§ 18-9-311, 6-1-302(2)(a); Ga. Code Ann. §§ 46-5-23 & 24; N.M. Stat. Ann. § 57-12-22; N.C. Gen. Stat. § 75-104; Tex. Util. Code § 55.126; *compare* 47 C.F.R. § 64.1200(a)(2)(iv) (2005) (allowing prerecorded calls to those with whom the caller has an established business relationship).

These areas include restrictions on calls for noncommercial purposes,[10] calls by non-profit entities,[11] calls to persons with whom the telemarketer has a preexisting business relationship,[12] disclosure requirements,[13] and calling hours and holiday restrictions.[14]

Inconsistent State statutes continue to proliferate despite the FCC's warning that such laws "almost certainly" would be preempted if applied to interstate calls.[15] State

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[10] *See* Minn. Stat. § 325E.27; Mont. Code §45-8-216; N.H. Rev. Stat. § 359-E:1; N.D. Cent. Code § 51-28-02.

[11] Under the FCC rule, calls made by non-profit organizations are exempt from the do-not-call rules. 47 C.F.R. §§ 64.1200(d)(7), (f)(9). Twenty-one States place additional restrictions on such calls. *See, e.g.*, Alaska Stat. § 45.50.475 (exemption applies only to calls made by members or volunteers of the non-profit, and only if made to other members, previous donors, or those who recently expressed an interest in donating).

[12] *See* Ind. Code 24-4.7-1-1 (no exemption for established business relationships); Mo. Rev. Stat. § 407.1095(3)(b); La. Rev. Stat. Ann. § 45:844.12(6)(c), Mich. Comp. Laws Ann. § 455.111(j) (period for defining the existence of an established business relationship shorter than the 18 months established by 47 C.F.R. § 64.1200(f)(3)).

[13] Thirty States have imposed additional requirements on the content and timing of disclosures to be made during telemarketing calls beyond the detailed requirements set forth in the FCC rule (47 C.F.R. § 64.1200(d)(4)). *Compare* Ky. Rev. Stat. Ann. § 367.46953, N.M. Stat. Ann. § 57-12-22; Kan. St[illegible]. Ann. § 50-670(b)(4).

[14] The FCC rule allows t[illegible]emarketing calls between 8 a.m. and 9 p.m. but imposes no restrictions on the days on which calls may be made. 47 C.F.R. § 64.1200(c)(1). Seventeen States further restrict calling hours, ban calls on weekends, or prohibit calls during holidays. *See, e.g.*, La. Rev. Stat. Ann. §§ 45:811(3), 1:55 (prohibiting telemarketing calls between 8-9 p.m., and on Sunday and federal and State holidays).

[15] *E.g.*, on June 2, 2006, Tennessee enacted a law (S.B. 3162) that authorized its own state do-not-call list nearly three years after the FCC issued its rule creating a single national list. On March 13, 2006, Mississippi enacted a successor Telephone Solicitation Act that differed from the federal standards. Miss. S.B. 2695. On March 17, 2006, Indiana enacted legislation (H.B. 1280) concerning fax advertisements that differed significantly from the federal provisions. The inconsis-

legislatures continue to consider proposed legislation that is inconsistent with the federal rules.[16] State Attorneys General also routinely enforce State statutes against interstate calls; many of these cases have been settled prior to a decision on the merits of the preemption defense because of the threat of enormous *in terrorem* fines that are potentially imposed for every call made in violation of the statutes.[17]

The question of the proper application of this Court's preemption decisions to the TCPA saving clause has been addressed in several prior decisions.

For example, in *Utah Division of Consumer Protection v. Flagship Capital*, 125 P.3d 894 (2005), the Supreme Court of Utah considered whether a State law that prohibited use of automatic telephone dialing systems was preempted by the TCPA, which regulates but does not prohibit such calls. 47 U.S.C. § 227(b)(1)(D). The Supreme Court reversed a lower court decision that had dismissed on preemption grounds a State enforcement action against a Florida telemarketer. Ignoring the long history of federal regulation, the court erroneously held that since the police power was at issue, there was a presumption that the State law was constitutional and that

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tent California statute at issue in *Chamber of Commerce* similarly was passed after adoption of the federal law.

[16] *E.g.*, on January 10, 2005, a bill was introduced in the Alaska legislature (Alaska H.B. 62) that sought to ban prerecorded calls to persons on the Alaska or federal do-not-call lists when the purpose of the call was "to communicate a message made to convince potential voters concerning the outcome of an election of a candidate or made to influence the outcome of a proposition." *See also* Iowa H.B. 36 (introduced January 11, 2005) (proposing to remove all exemptions to the prohibition on prerecorded messages, which would restrict political calls).

[17] TCPA preemption claims also have arisen in several cases involving efforts by telemarketers to remove State enforcement actions to federal court. *See, e.g.*, *North Carolina v. Debt Management Services Inc.*, No. 5:03-CV-950-FL(3) (E.D.N.C. Mar. 8, 2004); *Florida v. The Sports Authority*, No. 6:04-cv-115-Orl-JGG (M.D. Fla. June 4, 2004).

the challenger faced a burden of proving that it was unconstitutional. 125 P.3d at 900. It further found that there was no conflict between the Utah law and the federal law, because the telemarketer could comply with both standards if it simply chose not to make calls to Utah residents. *Id.* at 901. The court concluded:

> That the TCPA creates a uniform nationwide minimum set of prohibited telemarketing activities does not mean that Utah's heightened standard for companies wishing to make phone calls to this state conflicts with the federal scheme.

Id. Its holding is plainly inconsistent with prior decisions of this Court, which establish that a State cannot avoid a preemption challenge by arguing that the regulated entity should simply refrain from performing the activity that is lawful under the federal standard. *See, e.g.*, *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 379-80 (2000) ("Sanctions are drawn not only to bar what they prohibit but to allow what they permit, and the inconsistency of sanctions here undermines the congressional calibration of force.").

By contrast, in *Chamber of Commerce v. Lockyer*, the Eastern District of California held that a State statute that imposed more restrictive standards on interstate fax advertisements than federal law, by requiring express prior consent of the recipient, was preempted because the more stringent provision created an obstacle to the accomplishment of the federal purposes. 2006 WL 462482 at *8.

In reaching its decision, the Supreme Court of North Dakota explicitly declined to follow the decision in *Chamber of Commerce* and chose instead to adopt the reasoning of the Supreme Court of Utah in *Flagship Capital*. (App. 26a). It thereby repeated the two legal errors made by the Utah court, in applying an improper preemption standard to an area with a long history of exclusive fed-

eral regulation, and in concluding that the State statute did not frustrate the federal purposes because Petitioner could have avoided any problem "if it had complied with North Dakota law and refrained from placing calls to North Dakota residents." (App. 22a).

Until this Court definitively decides the question, disputes will continue to arise concerning the legal authority of the States under the TCPA to impose more stringent restrictions on interstate telephone calls than were adopted by Congress and the FCC. This cause presents the preemption question in the context of a final judgment in an enforcement action. The legal issue is squarely presented, and there are no threshold procedural issues or questions of fact that would complicate the Court's ability to reach the merits.

Further, the question arises in the context of a prohibition of prerecorded, interstate political polling calls. The political speech considerations demonstrate the practical significance of the legal issue and the chilling effect of the North Dakota statute as applied to prohibit expression that is fully protected under the First Amendment.

The interests of judicial economy would be served by resolving the issue at this time, before there is further fracturing of what Congress intended to be uniform national rules governing interstate calls and before litigation on this issue proliferates further.

In its 2003 rulemaking, the FCC stated its belief that "any state regulation of interstate telemarketing calls that differs from our rules almost certainly would conflict with and frustrate the federal scheme and almost certainly would be preempted." *2003 Report and Order* ¶ 84. The agency explicitly urged the States to refrain from creating such conflicts: "We reiterate the interest in uniformity – as recognized by Congress – and encourage states to avoid subjecting telemarketers to inconsistent rules." *Id.* Nevertheless, as noted, the States continue to

adopt laws that are more stringent than the counterpart federal rules.

In the 2003 proceeding, the FCC also stated that it would establish a process by which "any party that believes a state law is inconsistent with section 227 or our rules may seek a declaratory ruling from the Commission" and that it would "consider any alleged conflicts between state and federal requirements and the need for preemption on a case-by-case basis." *Id.* Many parties have sought declaratory rulings from the FCC that various State statutes regulating commercial telemarketing calls are preempted.[18] Indeed, shortly before the initiation of this enforcement action, FreeEats.com filed a petition seeking a declaratory ruling that Section 51-28-02 was preempted.[19] To date, the FCC has not acted upon any of these submissions.

The pendency of the requests before the FCC in no way argues against granting the Petition in this case. The North Dakota court has entered a final judgment against Petitioner holding that the TCPA does not preempt Section 51-28-02. Even if the FCC were to issue a declaratory ruling on the company's submission, that action would have no impact on its liability in this case and would provide scant protection for Petitioner or another telemarketer if it were to place political polling calls to North Dakota residents in the future.

Moreover, since the issue arises in the context of an enforcement action, it is both more concrete and unburdened by the peripheral administrative law issues that might accompany an appeal from a hypothetical future FCC decision.

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[18] *See, e.g.*, Joint Petition, *In the Matter of Alliance Contact Services*, FCC, CG Docket No. 02-278, filed April 29, 2005 (filed by 32 parties).

[19] *In the Matter of ccAdvertising*, Petition for Expedited Declaratory Ruling, FCC, CG Docket No. 02-278, filed Sept. 13, 2004.

The importance of the constitutional considerations that persuaded Congress to adopt a specific provision in the TCPA applicable to noncommercial prerecorded calls makes this a particularly appropriate case in which to review the recurrent issue concerning the proper interpretation of the TCPA saving clause.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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July 19, 2006

APPENDIX

APPENDIX

State of North Dakota ex rel. Wayne Stenenhjem, Attorney General v. FreeEats.com, Inc. 1a

State of North Dakota ex rel. Wayne Stenenhjem, Attorney General v. FreeEats.com, Inc., Case No. 04-C-1694 (Burleigh County Feb. 2, 2005). 27a

U.S. Const. art. VI, cl. 2 ..... 39a

Telephone Consumer Protection Act of 1991, 27 U.S.C. § 227 (excerpts). 39a

N.D. Cent. Code § 5-28-02 ..... 40a

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

JUDGMENT
Supreme Court No. 20050171

Appeal from the district court for Burleigh County.

State of North Dakota ex rel. Wayne Stenenhjem, Attorney General,	**Plaintiff and Appellee**
v.	
FreeEats.com, Inc., dba The FreeEats Companies, ccAdvertising, ccAdvertising.biz ccAdvertising.Info ElectionResearch.com FECads.com and FECResearch.com	**Defendant and Appellant**

This appeal having been heard by the Court at the October 2005 Term before Chief Justice Gerald W. VandeWalle, Justice Mary Muehlen Maring, Justice Carol Ronning Kapsner, Justice Daniel J. Crothers, and Surrogate Judge William F. Hodny, sitting in place of Justice Dale V. Sandstrom, disqualified;

and the Court having considered the appeal, it is ORDERED AND ADJUDGED that the judgment of the district court is AFFIRMED.

IT IS FURTHER ORDERED AND ADJUDGED that State of North Dakota ex rel. Wayne Stenehjem, Attorney General, have and recover from Appellant costs and disbursements on this appeal under Rule 39, N.D.R.App.P., to be taxed and allowed in the court below.

This judgment, together with the opinion of the Court filed this date, constitutes the mandate of the Supreme Court.

Dated: April 21, 2006.

By the Court:

_____

Chief Justice

ATTEST:

_____

Clerk

seal

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

2006 ND 84

State of North Dakota ex rel. Wayne Stenenhjem, Attorney General, **Plaintiff and Appellee**

v.

FreeEats.com, Inc., dba The FreeEats Companies, ccAdvertising, ccAdvertising.biz ccAdvertising.Info ElectionResearch.com FECads.com and FECResearch.com and Appellant **Defendant**

No. 20050171

Appeal from the District Court of Burleigh County, South Central Judicial District, the Honorable Gail H. Hagerty, Judge.

AFFIRMED.

Opinion of the Court by Kapsner, Justice.

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State ex rel. Stenehjem v. FreeEats.com, Inc.
No. 20050171

Kapsner, Justice.

[¶1] FreeEats.com, Inc. ("FreeEats") has appealed from a summary judgment finding FreeEats in violation of North Dakota's telephone solicitation statutes and imposing civil penalties, attorney fees, costs, and disbursements. We affirm, concluding North Dakota's prohibition against placement of political polling calls using an automatic dialing-announcing device is not preempted by federal law.

I

[¶2] FreeEats is based in Herndon, Virginia, and conducts telephone surveys and polling services. In August 2004, FreeEats placed numerous political polling calls from its call center in Ashburn, Virginia, to residences in

North Dakota. FreeEats employed an automatic dialing-announcing device to place the calls, and all of the calls used prerecorded messages with no live person on the line.

[¶3] On September 17, 2004, the State brought this action against FreeEats seeking civil penalties for violations of N.D.C.C. § 51-28-02. FreeEats admitted it made the automated calls to North Dakota residents, but argued application of N.D.C.C. § 5128-02 to interstate political polling calls was preempted by federal law. On cross-motions for summary judgment, the district court concluded that application of N.D.C.C. § 51-28-02 was not preempted by federal law and that the calls placed by FreeEats to North Dakota residents violated the statute. Judgment was entered ordering FreeEats to pay $10,000 in civil penalties and $10,000 in attorney fees, costs, and disbursements. FreeEats has appealed, alleging the district court erred in concluding that federal law did not preempt application of N.D.C.C. § 51-28-02 to interstate political polling calls.

II

[¶4] Summary judgment is a procedural device for the prompt resolution of a controversy on the merits without a trial if there are no genuine issues of material fact or inferences that can reasonably be drawn from the undisputed facts, or if the only issues to be resolved are questions of law. Wheeler v. Gardner, 2006 ND 24, ¶8, 708 N.W.2d 908; Jacob v. Nodak Mut. Ins. Co., 2005 ND 56, ¶ 11, 693 N.W.2d 604. Summary judgment is appropriate if the issues in the case are such that resolution of any factual disputes will not alter the result. Jacob, at ¶11; Tibert v. Slominski, 2005 ND 34, ¶8, 692 N.W.2d 133. Whether the trial court properly granted summary judg-

ment is a question of law that we review de novo on the entire record. Wheeler, at 118; Heng v. Kotech Med. Corp., 2004 ND 204, ¶9, 688 N.W.2d 389.

[¶5] In this case there are no disputed issues of material fact, and the sole question presented involves interpretation of statutes. Interpretation and application of a statute is a question of law, which is fully reviewable on appeal. Wheeler, 2006 ND 24, ¶10, 708 N.W.2d 908; Smith v. Hall, 2005 ND 215, ¶15, 707 N.W.2d 247. Accordingly, this case was appropriate for resolution on a motion for summary judgment.

III

[¶6] The sole question presented on appeal is whether federal law preempts the application of N.D.C.C. § 5.1-28-02 to automated political polling calls made from Virginia to residents in North Dakota.

[¶7] Section 51-28-02, N.D.C.C., prohibits the placement of telephone calls using an automatic dialing-announcing device except in certain enumerated instances:

> A caller may not use or connect to a telephone line an automatic dialing-announcing device unless the subscriber has knowingly requested, consented to, permitted, or authorized receipt of the message or the message is immediately preceded by a live operator who obtains the subscriber's consent before the message is delivered. This section and section 51-28-05 do not apply to a message from a public safety agency notifying a person of an emergency; a message from a school district

> to a student, a parent, or an employee; a message to a subscriber with whom the caller has a current business relationship; or a message advising an employee of a work schedule.

The calls placed by FreeEats to North Dakota residents in 2004 did not fit under any of the exemptions in N.D.C.C. § 51-28-02.

[¶8] FreeEats contends, however, that application of N.D.C.C. § 51-28-02 to interstate calls is preempted by 47 U.S.C. § 227, the Telephone Consumer Protection Act of 1991 ("TCPA"). The TCPA prohibits calls to a residential telephone line using an artificial or prerecorded voice without the recipient's prior express consent, "unless the call is initiated for emergency purposes or is exempted by rule or order by the [Federal Communications] Commission under paragraph (2)(B)." 47 U.S.C. § 227(b)(1)(B). Under paragraph (2)(B), the FCC is authorized to exempt calls that are not made for a commercial purpose. 47 U.S.C. § 227(b)(2)(B)(i). The FCC has adopted a regulation exempting calls not made for a commercial purpose from the TCPA's general prohibition on calls using an artificial or prerecorded voice message. 47 C.F.R. § 64.1200(a)(2)(ii) (2005). FreeEats contends the political polling calls at issue in this case were not made for a commercial purpose, and were therefore permissible under federal law.

A

[¶9] The crux of this case lies in the interpretation of the TCPA's "savings clause," 47 U.S.C. § 227(e)(1):

> (1) State law not preempted

> Except for the standards prescribed under subsection (d) of this section and subject to paragraph (2) of this subsection, nothing in this section or in the regulations prescribed under this section shall preempt any State law that imposes more restrictive intrastate requirements or regulations on, or which prohibits-
>
> (A) the use of telephone facsimile machines or other electronic devices to send unsolicited advertisements;
> (B) the use of automatic telephone dialing systems;
> (C) the use of artificial or prerecorded voice messages; or
> (D) the making of telephone solicitations.

[¶10] The parties offer conflicting interpretations of the statute, centering upon the scope of the term "intrastate." The State contends the language of the statute is clear and unambiguous, and the term "intrastate" modifies only "more restrictive . . . requirements or regulations," and does not modify "which prohibits." The State argues that the TCPA therefore expressly permits application of state statutes which prohibit certain classes of calls placed with automatic dialing systems or which use artificial or prerecorded voice messages to interstate calls placed to North Dakota residents. FreeEats argues the legislative history of the TCPA indicates Congressional intent to preempt state regulation of interstate calls, and therefore urges that the term "intrastate" must be read as applying to the phrase "which prohibits." Thus, FreeEats contends, the TCPA preempts any attempt by a state to either regulate or prohibit interstate calls which employ automatic dialers or prerecorded messages.

[¶11] In interpreting the statute, we are guided by well-settled rules of federal statutory construction. When the language of a statute is plain, "the sole function of the courts-at least where the disposition required by the text is not absurd-is to enforce it according to its terms." Dodd v. United States, 125 S.Ct. 2478, 2483 (2005) (quoting Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A., 530 U.S. 1, 6 (2000)); Lamie v. United States Trustee, 540 U.S. 526, 534 (2004) (quoting Hartford). The "preeminent canon of statutory interpretation" requires that courts "presume that [the] legislature says in a statute what it means and means in a statute what it says there." Bedroc Ltd. v. United States, 541 U.S. 176, 183 (2004) (quoting Connecticut Nat'l Bank v. Germain, 503 U.S. 249, 253-54 (1992)); see Dodd, at 2482 (quoting Connecticut Nat'l Bank). The court's inquiry "begins with the statutory text, and ends there as well if the text is unambiguous," Bedroc, at 183, and courts and administrative agencies must give effect to the unambiguously expressed intent of Congress. Norfolk & Western Rv. Co. v. American Train Dispatchers Ass'n, 499 U.S. 117, 128 (1991).

[¶12] The Supreme Court has concluded that "vague notions of a statute's 'basic purpose' are . . . inadequate to overcome the words of its text regarding the specific issue under consideration." Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204,220 (2002) (quoting Mertens v. Hewitt Assocs., 508 U.S. 248,261 (1993)). It is not a court's function "to find reasons for what Congress has plainly done," but rather the court's job is to "avoid rendering what Congress has plainly done . . . devoid of reason and effect." Great-West, at 217-18. It is for Congress, not the courts, to amend a statute if the plain language of the statute does not accurately reflect the true intent of Congress. See Dodd, 125 S.Ct. at 2483. As noted by the Supreme Court in Carter v. United States, 530

U.S. 255, 271 (2000) (citation omitted) (quoting Bank One Chicago, N.A. v. Midwest Bank & Trust Co., 516 U.S. 264, 279 (1996) (Scalia, J., concurring)), when construing a statute a court must "begin by examining the text, not by 'psychoanalyzing those who enacted it.'"

[¶13] The TCPA savings clause expressly exempts from preemption "any State law that imposes more restrictive intrastate requirements or regulations on, or which prohibits" unsolicited fax advertisements, use of automatic dialers, use of artificial or prerecorded voice messages, or making of telephone solicitations. 47 U.S.C. § 227(e)(1). The State contends that the use of the disjunctive "or," preceded by a comma, indicates the word "intrastate" in the first clause does not modify the second clause. FreeEats essentially ignores the language of the statute and bases its argument upon the contention that the legislative history demonstrates Congressional intent to preempt all state statutes affecting interstate calls.

[¶14] The word "or" is disjunctive in nature and ordinarily indicates an alternative between different things or actions. Reiter v. Sonotone Corp., 442 U.S. 330, 338-39 (1979); Christl v. Swanson, 2000 ND 74, ¶12, 609 N.W.2d 70; Narum v. Faxx Foods, Inc., 1999 ND 45, ¶20, 590 N.W.2d 454. Terms or phrases separated by "or" have separate and independent significance. Reiter, at 338-39. Coupled with the comma preceding "or," which indicates a separate clause, the statutory language clearly creates two distinct and independent phrases. Thus, read logically and grammatically, the statute states that nothing in the TCPA preempts any state law "that imposes more restrictive intrastate requirements or regulations on" the enumerated classes of calls, and nothing in the TCPA preempts any state law "which prohibits" calls within the

enumerated list. "Intrastate" unambiguously modifies only the first clause, not the second. If Congress had intended that the second part of the statute apply only to intrastate calls, "it could simply have said that." Great-West, 534 U.S. at 218. Because the statutory text is unambiguous, our inquiry into its meaning ends there. Bedroc, 541 U.S. at 183.

[¶15] FreeEats contends that, even if the statutory language is clear, a literal interpretation of the statute would create an absurd result. See Dodd, 125 S.Ct. at 2483; Lamie, 540 U.S. at 534. Specifically, FreeEats argues it is illogical to allow states to adopt more restrictive regulations on only intrastate calls, but to allow wholesale prohibition of certain classes of both intrastate and interstate calls.

[¶16] FreeEats contends that one important policy basis for enactment of the TCPA was to alleviate the excessive burdens which might be placed upon interstate telemarketers if they were required to comply with a plethora of conflicting regulations from all fifty states. In this context, there may be a substantial difference between the effect of state laws which seek to impose voluminous regulations upon interstate calls and those which wholly prohibit a specific class of interstate calls. The TCPA and corresponding regulations govern many diverse aspects of such calls. For example, under the relevant federal regulation, telephone solicitations may only be made to a residential telephone customer between 8 a.m. and 9 p.m. local time. 47 C.F.R. § 64.1200(c)(1). It is foreseeable that, if each state adopted differing time restrictions on telemarketing calls, it may be difficult for a telemarketer to adjust its equipment to place calls to the various states only within a particular state's permissible hours. The

states could conceivably create a stream of inconsistent and conflicting regulations on innumerable aspects of telemarketing calls, thereby making compliance with each individual state's unique set of rules and regulations burdensome.

[¶17] By contrast, it would be a relatively simple matter for a telemarketer to comply with a state statute which wholly prohibits certain enumerated classes of calls. When contemplating placing a certain type of call, the telemarketer need only review state law to determine if such calls are prohibited in a particular state. If so, it is presumably an easy task for the telemarketer to refrain from placing calls to that state's residents. See Utah Div. of Consumer Prot. v. Flagship Capital, 2005 UT 76, ¶22, 125 P.3d 894 ("the record does not reflect that a national telemarketer would confront any substantial hardship by being required to determine which of its calls reach the telephones of Utah residents").

[¶18] We conclude that a literal interpretation of the unambiguous language of the statute does not lead to an absurd result. See Dodd, 125 S.Ct. at 2483; Lamie, 540 U.S. at 534. We therefore interpret the express language of 47 U.S.C. § 227(e)(1) to provide that the TCPA does not preempt any state law which prohibits interstate calls using automatic telephone dialing systems or using artificial or prerecorded voice messages. We must review FreeEats' claim of federal preemption within the context of this interpretation of the TCPA.

B

[¶19] Under the Supremacy Clause, U.S. Const. art. VI, the laws of the United States are the "supreme law of the land," and state law that conflicts with federal law is without effect. Home of Economy v. Burlington N. Santa

Fe R.R., 2005 ND 74, ¶5, 694 N.W.2d 840. In Home of Economy, we quoted the United States Supreme Court's outline of the parameters of federal preemption under the Supremacy Clause:

> First, Congress can define explicitly the extent to which its enactments pre-empt state law. Pre-emption fundamentally is a question of congressional intent, and when Congress has made its intent known through explicit statutory language, the courts' task is an easy one.
>
> Second, in the absence of explicit statutory language, state law is pre-empted where it regulates conduct in a field that Congress intended the Federal Government to occupy exclusively. Such an intent may be inferred from a "scheme of federal regulation . . . so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it," or where an Act of Congress "touch[es] a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject." Although this Court has not hesitated to draw an inference of field preemption where it is supported by the federal statutory and regulatory schemes, it has emphasized: "Where ... the field which Congress is said to have pre-empted" includes areas that have "been traditionally occupied by the States," congressional intent to supersede state laws must be "'clear and manifest.'"
>
> Finally, state law is pre-empted to the extent that it actually conflicts with federal law. Thus, the Court has found pre-emption where it is im-

> possible for a private party to comply with both state and federal requirements, or where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."

Home of Economy, at ¶5 (quoting English v. General Elec. Co., 496 U.S. 72, 78-79 (1990)). Thus, federal preemption analysis includes three components: express preemption, field preemption, and conflict preemption.

[¶20] Because of the "interstitial nature of Federal law," preemption of state law is not favored, and the framework for analyzing a preemption claim under the Supremacy Clause begins with the basic assumption that Congress did not intend to displace state law. Billey v. North Dakota Stockmen's Ass'n, 1998 ND 120, ¶28, 579 N. W.2d 171 (quoting Federal Land Bank of St. Paul v. Lilichaugen, 404 N.W.2d 452, 455 (N.D. 1987)); see also Home of Economy, 2005 ND 74, ¶6, 694 N.W.2d 840. The United States Supreme Court has expressly noted that, because "the States are independent sovereigns in our federal system, we have long presumed that Congress does not cavalierly pre-empt" state law. Bates v. Dow Agrosciences LLC, 125 S.Ct. 1788, 1801 (2005) (quoting Medtronic. Inc. v. Lohr, 518 U.S. 470, 485 (1996)). Although the assumption that Congress did not intend to displace state law is not ordinarily triggered when a state statute touches upon an area where there has been a history of significant federal presence, where the state acts in a field that states have traditionally occupied, the assumption that the state's historic police powers are not superseded by federal law applies unless Congress clearly and manifestly expresses a contrary intent. Home of Economy, at ¶6.

[¶21] It has long been recognized that the police power of a state extends beyond the health, morals, and safety of the community, and encompasses the duty to protect the privacy of its citizens, including the authority to protect the peaceful enjoyment of the home and the well-being and tranquility of the community. See Hynes v. Mayor and Council, 425 U.S. 610, 619 (1976); Breard v. City of Alexandria, 341 U.S. 622, 640 (1951); Thornhill v. Alabama, 310 U.S. 88, 105 (1940). This authority includes the power to enact laws regulating or prohibiting interstate telemarketing practices. See Flagship Capital, 2005 UT 76, ¶¶19-20, 125 P.3d 894. Furthermore, the United States Court of Appeals for the Eighth Circuit, in a case upholding the constitutionality of the North Dakota Telephone Solicitations Act, N.D.C.C. ch. 51-28, the statute involved here, noted that "residential privacy is a 'significant' government interest, particularly when telemarketing calls 'are flourishing, and becoming a reoccurring nuisance by virtue of their quantity.'" Fraternal Order of Police v. Stenehiem, 431 F.3d 591, 597 (8th Cir. 2005) (quoting Van Bergen v. Minnesota, 59 F.3d 1541, 1555 (8th Cir. 1995)). In concluding that a Utah statute regulating telemarketing was not preempted by the TCPA, the Supreme Court of Utah held that, "[w]here the police power is at issue, there is a presumption that the regulations can constitutionally coexist, with a resulting burden of proof placed on the party claiming preemption." Flagship Capital, at ¶20 (citing Hillsborough County v. Automated Med. Labs, Inc., 471 U.S. 707, 716 (1985)). As noted by the United States Supreme Court, when considering preemption a court must "start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." City of Columbus v. Ours

Garage & Wrecker Serv., Inc., 536 U.S. 424, 432 (2002) (quoting Wisconsin Pub. Intervenor v. Mortier, 501 U.S. 597, 605 (1991)).

[¶22] We thus begin our analysis with the assumption that Congress did not intend the TCPA to abrogate statutes implementing the state's police power to protect its citizens' privacy and peaceful enjoyment of their homes, and FreeEats, as the party claiming preemption, bears the burden of proving it was the clear and manifest intent of Congress to supersede state law. See Bates, 125 S.Ct. at 1801; Cipollone v. Liggett Group, Inc., 505 U.S. 504, 516 (1992); Billey, 1998 ND 120, ¶28, 579 N.W.2d 171; State v. Liberty Nat'l Bank & Trust Co., 427 N.W.2d 307, 310 (N.D. 1988). The "ultimate touchstone" of preemption analysis is Congressional intent. Cipollone, 505 U.S. at 516 (quoting Malone v. White Motor Corn., 435 U.S. 497, 504 (1978)). When Congress has expressly addressed preemption in the federal statute, the question whether the federal law preempts state law necessarily is largely a matter of statutory construction. Home of Economy, 2005 ND 74, ¶6, 694 N.W.2d 840; Billey, at ¶28; Liberty, at 310 (quoting L. Tribe, American Constitutional Law § 6-25, at 480 (2d ed. 1988)). In such cases, the plain wording of the statute "necessarily contains the best evidence of Congress' pre-emptive intent." Sprietsma v. Mercury Marine, 537 U.S. 51, 62-63 (2002) (quoting CSX Transp., Inc. v. Easterwood, 507 U.S. 658, 664 (1993)).

C

[¶23] As previously noted, there are three forms of federal preemption: express preemption, field preemption, and conflict preemption. Express preemption arises when Congress has explicitly defined the extent to which its enactment preempts state law. English, 496 U.S. at 78; Home of Economy, 2005 ND 74, ¶5, 694 N.W.2d 840.

There is no provision in the TCPA which explicitly states that the federal statute was intended to preempt state laws prohibiting certain classes of interstate calls. Rather, the federal act includes a provision explicitly stating that such state laws are not preempted by the TCPA. See 47 U.S.C. § 227(e)(1). There is no express preemption in this case.

D

[¶24] FreeEats contends that the pervasive and comprehensive scope of the TCPA evidences Congressional intent to fully occupy the field and preempt any and all state laws attempting to regulate or prohibit interstate telemarketing calls.

[¶25] Field preemption occurs when Congress intends federal law to occupy the entire field covered by the federal statute, to the exclusion of state regulation of the same subject matter. English, 496 U.S. at 79; Home of Economy, 2005 ND 74, ¶5, 694 N.W.2d 840. Such an intent may be inferred when the scheme of federal regulation is so pervasive as to create an inference that Congress left no room for the states to supplement it, or when the federal interest in the field is so dominant that it will be assumed to preclude enforcement of state laws on the same subject. English, at 79; Home of Economy, at ¶5. Where the field to be preempted encompasses areas that have been traditionally occupied by the states through their police power, congressional intent to displace state law must be "clear and manifest." English, at 79 (quoting Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977)); Home of Economy, at ¶5; see also Ours Garage, 536 U.S. at 432.

[¶26] In Flagship Capital, 2005 UT 76, ¶18, 125 P.3d 894, the court expressly rejected the notion that the federal

interest in regulating interstate telemarketing is so dominant that it supersedes all state laws touching the issue:

> While it is unquestioned that telemarketing is national, in fact global, in its scope, this confluence of commerce and technology, despite its power to inspire widespread annoyance and worse, throughout our nation, has not necessarily thereby created an exclusive federal interest. The Supreme Court has stated that "every subject that merits congressional legislation is, by definition, a subject of national concern. That cannot mean, however, that every federal statute ousts all related state law." Hillsborough County v. Automated Labs. Inc., 471 U.S. 707, 716, 105 S.Ct. 2371, 85 L.Ed.2d 714 (1985). An apt analogy is the regulation of interstate highways. There, the interstate nature of the field is so undisputable that the subject has the word "interstate" in its name. However, this does not mean that federal interests dominate in the regulation of this interstate system. Instead, most of the regulation of the highways is left to the individual states to regulate through their police power to protect their citizens' health, welfare, and safety. Interstate telemarketing fits a similar niche. Like interstate highways, there is a federal interest, as illustrated by the TCPA, to define the basic parameters within which interstate telemarketing may occur. Within those walls, however, the states are left with discretion to determine whether the welfare of their citizens requires greater protection and to act on that determination.

[¶27] Similarly, the United States Supreme Court in Hillsborough, 471 U.S. at 717, concluded that the comprehensive nature of federal law on a subject does not necessarily mean states are barred from imposing additional requirements:

> In New York Dept. of Social Services v. Dublino, 413 U.S. 405, 93 S.Ct. 2507, 37 L.Ed.2d 688 (1973), the Court stated that "[t]he subjects of modern social and regulatory legislation often by their very nature require intricate and complex responses from the Congress, but without Congress necessarily intending its enactment as the exclusive means of meeting the problem." Id., at 415, 93 S.Ct., at 2514. There, in upholding state work-incentive provisions against a pre-emption challenge, the Court noted that the federal provisions "had to be sufficiently comprehensive to authorize and govern programs in States which had no . .. requirements of their own as well as cooperatively in States with such requirements." Ibid. But merely because the federal provisions were sufficiently comprehensive to meet the need identified by Congress did not mean that States and localities were barred from identifying additional needs or imposing further requirements in the field.

[¶28] The inclusion in a federal act of a specific, limited preemption provision is a clear expression of Congressional intent that federal law was not meant to wholly preempt state law in this field. Billey, 1998 ND 120, ¶31, 579 N.W.2d 171. The United States Supreme Court recognized in Cipollone, 505 U.S. at 517:

> When Congress has considered the issue of pre-emption and has included in the enacted legislation a provision explicitly addressing that issue, and when that provision provides a "reliable indicium of congressional intent with respect to state authority," Malone v. White Motor Corp., 435 U.S., at 505, 98 S.Ct., at 1190, "there is no need to infer congressional intent to pre-empt state laws from the substantive provisions" of the legislation. California Federal Savings & Loan Assn. v. Guerra, 479 U.S. 272, 282, 107 S.Ct. 683, 690,93 L.Ed.2d 613 (1987) (opinion of Marshall, J.).

[¶29] The United States Court of Appeals for the Eighth Circuit has expressly held that there was no intent by Congress to create field preemption under the TCPA:

> The TCPA carries no implication that Congress intended to preempt state law; the statute includes a preemption provision expressly not preempting certain state laws. If Congress intended to preempt other state laws, that intent could easily have been expressed as part of the same provision. Further, the preemption provision makes it clear that Congress did not intend to "occupy the field" of ADAD regulation, see Florida Lime & Avocado Growers v. Paul, 373 U.S. 132, 142, 83 S.Ct. 1210, 1217, 10 L.Ed.2d 248 (1963), or to promote national uniformity of ADAD regulation, as it expressly does not preempt state regulation of intrastate ADAD calls that differs from federal regulation.

Van Bergen, 59 F.3d at 1548.

[¶30] The TCPA includes explicit provisions stating the TCPA was not intended to preclude enforcement of all state laws within its subject matter. See 47 U.S.C. § 227(e)(1). In fact, 47 U.S.C. § 227(e)(1) is expressly titled "State law not preempted." See Chair King Inc. v. GTE Mobilnet of Houston, Inc., 184 S.W.3d 707, 718 (Tex. 2006). The TCPA also contains a provision reserving the right of state officials to bring actions in state courts "on the basis of an alleged violation of any general civil or criminal statute of such State." 47 U.S.C. § 227(f)(6). The statutory language of the TCPA clearly expresses the intent of Congress that the TCPA was not meant to wholly occupy the field within its subject matter, and was not intended to preempt all state law affecting the same subject. We conclude there is no field preemption in this case.

E

[¶31] The final prong of preemption analysis is conflict preemption. Conflict preemption may be found to exist "where it is impossible for a private party to comply with both state and federal requirements, or where state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" English, 496 U.S. at 79 (citation omitted) (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)); Home of Economy, 2005 ND 74, ¶5, 694 NM.2d 840 (quoting English).

[¶32] FreeEats has failed to meet its burden of demonstrating that application of N.D.C.C. § 51-28-02 to interstate political polling calls would make it impossible for a private party to comply with both federal and state law. In analyzing such "actual conflict" preemption, the United States Supreme Court has used the example of a state law that would "premis[e] liability upon the presence of the very windshield retention requirements that federal law requires." Geier v. American Honda Motor

Co., 529 U.S. 861, 871-72 (2000). There has been no showing that a telemarketer's compliance with the prohibitions in N.D.C.C. § 51-28-02 would place it in direct noncompliance with the TCPA. In the context of this case, FreeEats would not have violated any provision in the TCPA if it had complied with North Dakota law and refrained from placing calls to North Dakota residents.

[¶33] FreeEats argues that there is an actual conflict between federal and state law because "FreeEats can conform to both sets of requirements only by forsaking the federally recognized right to use prerecorded messages when making interstate polling calls to residents of North Dakota." In addition to being premised upon a misreading of the clear and unambiguous language of the TCPA's savings clause, FreeEats' contention ignores the "interstitial nature" of federal law. See Billey, 1998 ND 120, ¶28, 579 N.W.2d 171. States are generally free to complement federal law by identifying additional local needs and imposing further regulations. See Hillsborough, 471 U.S. at 717. A federal statutory prohibition of certain conduct does not automatically create an overarching right to engage in all conduct not expressly prohibited by the statute.

[¶34] Addressing whether the TCPA preempts application of state telemarketing laws to interstate telemarketing calls, the Supreme Court of Utah reasoned:

> Close examination of the Utah laws shows that they are not in conflict with the TCPA, nor do they stand as an obstacle to the accomplishment and full objective of federal law. We see no reason why telemarketing companies would be unable to comply with both the Utah laws and the

> federal statutes. This intention of the Utah legislature is made clear by Utah Code section 13-25a-103(4), which reads: "A person may not make or authorize a telephone solicitation in violation of Title 47 U.S.C. 227." The telemarketing standards set by our legislature are stricter than, but do not directly conflict with, the federal standards. A telemarketer who complies with the Utah standards will have little difficulty complying with the federal standards. Moreover, the record does not reflect that a national telemarketer would confront any substantial hardship by being required to determine which of its calls reach the telephones of Utah residents. Therefore, the Utah law does not force a telemarketer to conform its nationwide practices with Utah standards in order to prevent an inadvertent violation. The telemarketer can simply identify those calls that would be made to Utah and choose to not make those calls or to conform those calls to the Utah regulations. That the TCPA creates a uniform nationwide minimum set of prohibited telemarketing activities does not mean that Utah's heightened standard for companies wishing to make phone calls to this state conflicts with the federal scheme.

Flagship Capital, 2005 UT 76, ¶22, 125 P.3d 894 (footnote omitted); see also Chair King, 184 S.W.3d at 718 ("Congress clearly did not intend the TCPA to establish a ceiling if states decided to be more aggressive in their approach").

[¶35] Similarly, we conclude FreeEats has failed to demonstrate that application of N.D.C.C. § 51-28-02 to inter-

state political polling calls would stand as an obstacle to the accomplishment of the full purposes of Congress in enacting the TCPA. When Congress has addressed preemption in the federal statute, preemption is necessarily a question of statutory construction, Home of Economy, 2005 ND 74, ¶6, 694 NW.2d 840, and where Congress has expressed its intent in reasonably plain terms the language of the statute is ordinarily regarded as conclusive. Negonsott v. Samuels, 507 U.S. 99, 104 (1993). Here, the plain language of 47 U.S.C. § 227(e)(1) demonstrates that it was not within the full purposes of the TCPA to prevent states from prohibiting certain interstate telemarketing calls.

[¶36] FreeEats argues that the United States Supreme Court's decisions in Geier, 529 U.S. 861 (2000) and United States v. Locke, 529 U.S. 89 (2000), make it clear that statutory savings clauses do not insulate state enactments from preemption analysis. See also Sprietsma, 537 U.S. at 65. The Court in those cases recognized that inclusion of a savings clause in a federal statute does not bar the ordinary working of conflict preemption principles. See Sprietsma, at 65; Geier, at 869. The Court did not, however, hold that the language Congress employed in a savings clause is wholly immaterial to preemption analysis. The Court merely rejected the notion that inclusion of a savings clause created a "special burden" beyond that inherent in ordinary preemption principles, and concluded state law may be found preempted by federal law if there is an actual conflict with the federal objective. See Geier, at 87072.

[¶37] We do not read those cases as holding that a court may not consider the precise language of a savings clause when discerning the intent of Congress and the purpose

of the federal act when determining whether conflict preemption is present. In each of those cases, the Court was required to determine whether conflict preemption existed when there were inconsistent and conflicting preemption provisions and savings clauses within the federal statutes. They did not involve, as this case, an express provision explicitly providing that nothing in the federal statute "shall preempt any State law" on the precise subject matter involved in the case.

[¶38] We have analyzed the preemption question under ordinary conflict preemption principles. In doing so, we have attempted to discern the intent of Congress and to give effect to the purposes underlying the TCPA. We have found Congressional intent and the resulting purpose of the statute in the clear and unambiguous language of the statute. Where Congress has included an express provision granting states the power to enact laws prohibiting the use of automatic telephone dialing systems or artificial or prerecorded voice messages in interstate telemarketing calls, it cannot frustrate the intent of Congress when the state acts within the terms of that grant.

[¶39] In defining express preemption, the United States Supreme Court has held that "[p]re-emption fundamentally is a question of congressional intent, and when Congress has made its intent known through explicit statutory language, the courts' task is an easy one." English, 496 U.S. at 78-79 (citation omitted). Although this rule is ordinarily applied in situations where Congress has expressly declared that certain state laws are preempted, we see no reason why it does not apply with equal force when Congress clearly and unambiguously states that certain state laws are not preempted by the federal act. In either case, the intent of Congress is clear from the

statutory language, and the court's "easy" and solitary task is to enforce the statute according to its terms. We conclude Congress has clearly and unambiguously expressed its intent that the TCPA does not preempt application of a state statute prohibiting interstate telemarketing calls which use automatic dialing equipment or artificial or prerecorded voice messages.

[¶40] Our holding is in accord with the only other appellate decision expressly addressing this issue to date. See Flagship Capital, 2005 UT 76, 125 P.3d 894. FreeEats has drawn our attention to a recent federal trial court decision holding, in the context of interstate facsimile advertisements, that the TCPA's savings clause did not preclude preemption of California's attempt to regulate interstate fax advertising. Chamber of Commerce v. Lockyer 462482 (E.D Cal. Feb. 27, 2006). The court's decision in Lockyer was premised upon its conclusion that the presumption against preemption does not apply and upon a strained reading of the language of 47 U.S.C. § 227(e)(1). We decline to follow Lockyer.

IV

[¶41] We have considered the remaining issues and arguments raised by the parties and they are either unnecessary to our decision or are without merit. We affirm the judgment.

[¶42] Carol Ronning Kapsner
Mary Muehlen Maring
Daniel J. Crothers
William F. Hodny, S.J.
Gerald W. VandeWalle, C.J.

[¶43] The Honorable William F. Hodny, S.J., sitting in place of Sandstrom, J., disqualified.

STATE OF NORTH DAKOTA IN DISTRICT COURT

COUNTY OF BURLEIGH Case No. 04-C-1694

State of North Dakota ex rel. Wayne Stenehjem, Attorney General,

Plaintiff,

Opinion and Order

vs.

FreeEats.com, Inc. dba The FreeEats Companies, ccAdvertising, ccAdvertising.biz, ccAdvertising.Info, ElectionResearch.com FECads.com, and FECResearch.com,

Defendant.

Both the State of North Dakota (the State) and FreeEats.com (FreeEats) have requested the Court grant summary judgment in this matter. In order to decide the matter the Court must determine whether the federal Telephone Consumer Protection Act preempts Section 51-28-02 of the North Dakota Century Code and whether that section passes constitutional muster.

As explained in this opinion, the statute is not pre-empted, and because the statute is a content-neutral

time, place, or manner restriction on speech and it does not violate constitutional free speech protection.

FACTS

This action was commenced by the North Dakota Attorney General's office, Consumer Protection & Antitrust Division. The complaint alleges FreeEats violated North Dakota law by contacting, or attempting to contact, residents of North Dakota by telephone using an automatic dialing-announcing device (ADAD) containing a prerecorded polling voice message. *Compl.*, ¶ 8. The telephone messages were wholly automated, no live human being was on the calling end of the telephone. *Id.*, ¶ 10. It is alleged the North Dakota telephone subscribers did not knowingly request, consent to, or authorize the automated message from FreeEats. *Id.*, ¶ 11.

The complaint asserts the messages were not from "school districts to students, parents, or employees, messages to subscribers with whom FreeEats had a current business relationship, or messages advising employees of work schedules." *Id.*, ¶ 13. For the alleged violations, the State requested injunctive relief, civil penalties, and attorney fees and costs pursuant to North Dakota law. *Id.*, ¶ 14. FreeEats does not dispute this, admitting the calls were noncommercial political polling calls automatically placed by FreeEats in Virginia. *See Aff.* Gabriel Joseph, III, November 11, 2004.

Both parties filed motions for summary judgment. FreeEats claims, because (1) the calls were placed outside of North Dakota and (2) were noncommercial in nature, North Dakota is preempted by the federal Telephone Consumer Protection Act (TCPA). FreeEats also argues

the statute violates the First Amendment's free speech guarantees.

The State asserts the North Dakota law prohibiting most pre-recorded phone messages is not preempted by federal law and is not unconstitutional. The State also claims liability should be rendered against FreeEats as a matter of law because FreeEats has already admitted it made ADAD telephone calls in violation of North Dakota law.

LAW AND ANALYSIS

In their briefs, the parties address two main issues: Preemption and constitutional concerns. The presumption against federal preemption is strong, unless Congress clearly intended to do so. ***Gregory v. Ashcroft***, 501 U.S. 452, 461 (1991). In the same light, finding a North Dakota statute unconstitutional is difficult. In order for a statute to be held unconstitutional under the State Constitution, four of the five justices of the North Dakota Supreme Court must agree.

Federal Preemption

As stated, the presumption against federal preemption is strong. States have historically regulated against unfair business practices. ***Cedar Rapids Cellular Tel., L.P. v. Miller***, 280 F.3d 874, 879-80 (8th Cir. 2002). Consumer protection laws enjoy a stronger presumption against preemption. ***Black v. Financial Freedom Senior Funding Corp.***, 92 Cal. App. 4th 917, 926 (Cal. App. 2001) (holding "unfair business practices are included within the states' police power, and are thus subject to this heightened presumption against preemption"). Even the FCC has stated "states have a long history of regulat-

ing telemarketing practices." ***Rules and Regulations Implementing the Telephone Consumer Protection Act of 1992***, 68 Fed. Reg. 44154, ¶ 53.

The Eighth Circuit Court of Appeals has addressed the very issues presented here. ***Van Bergen v. Minnesota***, 59 F.3d 1541 (8th Cir. 1995). In ***Van Bergen*** the Eighth Circuit held the Minnesota ADAD statute was not preempted by the TCPA. The Minnesota statute read, as it does today:

> A caller shall not use or connect to a telephone line an automatic dialing-announcing device unless: (1) the subscriber has knowingly or voluntarily requested, consented to, permitted, or authorized receipt of the message; or (2) the message is immediately preceded by a live operator who obtains the subscriber's consent before the message is delivered. This section and section 325E.30 do not apply to (1) messages from school districts to students, parents, or employees, (2) messages to subscribers with whom the caller has a current business or personal relationship, or (3) message advising employees of work schedules.

Minn. Stat. § 325E.27 (1995); ***Van Bergen***, 59 F.3d at 1546. Section 51-28-02 of the North Dakota Century Code states, in virtually identical language to § 325E.27:

> A caller may not use or connect to a telephone line an automatic dialing-announcing device unless the subscriber has knowingly requested, consented to, permitted, or authorized receipt of the message or the message is immediately preceded by a live operator who obtains the sub-

> scriber's consent before the message is delivered. This section and section 51-28-05 do not apply to messages from school districts to students, parents, or employees, messages to subscribers with whom the caller has a current business relationship, or messages advising employees of work schedules.[1]

The same analysis used to find Minnesota's ADAD statute valid should be used here.

Van Bergen involved political ADAD telephone calls. Van Bergen, a candidate for governor of Minnesota, planned to use inexpensive ADAD calls to reach potential voters. ***Van Bergen*** 59 F.3d at 1546. The Minnesota Attorney General's office, however, informed Van Bergen the ADAD statute would apply to the noncommercial political type calls he was planning on placing. ***Id***. Van Bergen then applied for, and was denied, a temporary restraining order against the enforcement of the statute. He appealed the decision.

The Eighth Circuit analyzed whether the statute was preempted by the Federal TCPA. The Court cited the savings clause of the TCPA, stating state laws are not preempted if the State "imposes more restrictive intrastate requirements or regulations on, or which prohibits-- . . . (B) the use of automatic telephone dialing systems . . .

---

[1] In addition to Minnesota and North Dakota, at least four other states currently have similar provisions in their statutes prohibiting noncommercial interstate ADAD calling. Burns Ind. Code Ann. § 24-5-14-1 to 5 (2004); R.I. Gen. Laws § 5-61-3.4 (2004j); S.C. Code Ann. § 16-17-446 (2003); Tenn. Code Ann. § 47-18-1502 (2004).

." ***Van Bergen***, 59 F.3d at 1547 (quoting 47 U.S.C. § 227(e)(1)). There was no express preemption of the Minnesota statute found in the TCPA by ***Van Bergen***. ***Id***. at 1547-48. The TCPA simply does not state more restrictive state laws are preempted, only that more restrictive intrastate requirements are not preempted. If Congress wanted to expressly preempt state ADAD laws it would have done so explicitly.

The TCPA did not preempt the Minnesota statute by implication. ***Van Bergen***, 59 F.3d at 1548. While it is possible for federal law to preempt state law by implication, the TCPA was found not to carry such an implication. ***Id.*** The Court stated: "If Congress intended to preempt other state laws, that intent could easily have been expressed as part of [the savings clause]." ***Id***. The Court held Congress did not intend to "'occupy the field' of ADAD regulation . . . or to promote national uniformity of ADAD regulation, as it expressly does not preempt state regulations of intrastate ADAD that differs from federal regulation." ***Id.*** The Minnesota statute was not preempted for this reason, nor should the nearly identical North Dakota statute be preempted.

The Minnesota statute did not conflict with the TCPA. ***Van Bergen***, 59 F.3d at 1548. Only two differences were found between the TCPA and the "virtually identical" Minnesota statutes: 1) the TCPA exempts only emergency calls, and the Minnesota statute exempts callers with prior personal or business relationship from restrictions on ADAD calls; 2) the TCPA only applies to residences and specified businesses, such as hospitals, and the Minnesota statute applies to both residences and businesses. ***Id.*** at 1548. Recognizing the variations, the Court cited to a provision in the TCPA where Congress

authorized the FCC to consider: "the inclusion of businesses in the locations to which ADAD calls are limited; and the exemption of calls that do not adversely affect privacy rights, among which may be calls from those with whom a prior business or personal relationship exists." **Id.** The Court found "it was clear that the Minnesota statute and the TCPA [were] designed to promote an identical objective, and that there [was] nothing in the two statutes that create[d] a situation in which an individual [could not] comply with one statute without violating the other." ***Id.*** The same is true for the North Dakota statute.

FreeEats argues ***Van Bergen*** interpreted only the *intrastate* implications of the Minnesota ADAD statute, not the *interstate* implications. The alleged fact was not explicitly stated, or even implied, in ***Van Bergen***. Van Bergen did not even place any calls, he sought an injunction before placing them. The State's explanation of this omission here is persuasive; why would the Eighth Circuit even need to address federal preemption if the calls had been made intrastate? The savings clause would then *clearly* allow for state regulations of intrastate ADAD calls, making the need to address preemption a waste of the Court's time.

First Amendment

FreeEats argues Section 51-28-02 violates its right to freedom of speech guaranteed by the First Amendment. ***Van Bergen*** held Minnesota's ADAD statute constitutional. As both state's ADAD provisions are nearly identical, the same rationale in ***Van Bergen*** should be applied here to find the statute constitutional.

The statute is content-neutral, despite FreeEats' assertion it is not. FreeEats asserts the exceptions to the ADAD statute allowing schools, employers, and those with current business relationships to use ADAD technology to contact those subscribers is "content based" and "speaker based." This rationale is incorrect. Government is permitted to place "reasonable restrictions on the time, place or manner of engaging in protected speech" as long as the regulations are "without reference to the content of the regulated speech." ***Van Bergen***, 59 F.3d at 1550 (quoting ***Ward v. Rock Against Racism***, 497 U.S. 781, 791 (1989)).

The relationship between the caller and subscriber is determinative, not content. "Caller" was defined by Minnesota statute as "a person, corporation, . . . or commercial entity who attempts to contact, or who contacts, a subscriber in this state by using a telephone or a telephone line." Minn. Stat. § 325E.26 subd. 3. North Dakota defines a "caller" using virtually identical language. *(Section 51-28-01(2))*. In Minnesota "message" is defined "as including any call, regardless or its content." M.S.A. § 325E.26 subd. 6. North Dakota uses virtually identical language. *(Section 51-28-01(5))*.

The basis for the restrictions, both in Minnesota and North Dakota, is not on the basis of the content of their messages, rather it is on the basis of their relationship with the subscriber. ***Van Bergen***, 59 F.3d at 1550. "A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others." ***Id***. (quoting ***Clark v. Community for Creative Non-Violence***, 468 U.S. 288, 293 (1984)). In addition, these exceptions all rest on the single premise that the caller has a current relationship with the subscriber, implying

the subscriber's consent to receive ADAD calls. ***Id.*** Section 51-28-01 is content-neutral.

Van Bergen also addressed whether the content-neutral time, place, or manner restriction on the statute was "narrowly tailored to serve a significant government interest." The Court concluded it was narrowly tailored and provided adequate alternatives to communication. ***Van Bergen***, 59 F.3d at 1553-54. It declared residential privacy was a significant government interest. "[A] special benefit of the privacy all citizens enjoy within their own walls, which the State may legislate to protect, is an ability to avoid intrusions." ***Id.*** at 1554 (citation omitted). The Court concluded: "Moreover, we do not believe that external evidence of the disruption ADAD calls can cause in a residence is necessary: It is evident to anyone who has received such unsolicited calls when busy with other activities." ***Id.***

ADAD calls intrude on the privacy and peacefulness of the home and the efficiency of the workplace. ***Id.*** at 1555. They do not provide the telephone subscriber the ability not to receive such calls. ***Van Bergen*** held "the government has a substantial interest in limiting the use of unsolicited, unconsented-to ADAD calls." ***Id.***

Van Bergen next concluded the substantial interest the government had in restricting ADAD calls was narrowly tailored and provided ample alternative channels for communication (e.g. a live operator can call the subscriber). ***Id.*** at 1555-56. The statute did not foreclose an entire medium or communication. ***Id.*** at 1555. The limits on ADAD calls were deemed to be designed to fix perceived problems with the liberal use of the technology. "ADADs are a new technology, and people have been

campaigning for elective office, soliciting for charities, spreading religious messages, and selling products for centuries without the benefit of these machines." ***Id.*** at 1556.

The North Dakota ADAD statute is narrowly tailored to the governmental interests of protecting the privacy and tranquility of the private home and efficient work-place. The ability to place a telemarketing phone call to a resident of North Dakota is not foreclosed by the ADAD statute.

Conclusion

The State's motion for summary judgment is **granted**. FreeEats' motion for summary judgment is **denied**.

Dated: February 2, 2005.

BY THE COURT:

s/Gail Hagerty
Gail Hagerty
District Judge

STATE OF NORTH DAKOTA IN DISTRICT COURT

COUNTY OF BURLEIGH **Case No. 04-C-1694**

State of North Dakota ex rel. Wayne Stenehjem, Attorney General,

Plaintiff,

vs.

FreeEats.com, Inc. dba The FreeEats Companies, ccAdvertising, ccAdvertising.biz, ccAdvertising.Info, ElectionResearch.com FECads.com, and FECResearch.com,

Defendant.

Affidavit of Mailing

04-C-1694

I, Ronda Colby, being duly sworn, depose and say that I am a United States citizen over 21 years of age, and on the 2nd day of February, 2005, I deposited in a sealed envelope true copies of the attached:

OPINION AND ORDER

in the United States mail at Bismarck, North Dakota, postage prepaid and addressed to:

Lawrence King, P.O. Box 1695, Bismarck, ND 58502
Emilio Cividanes, 1200 19th St NW, Washington, DC 20036-2430
James Thomas, P.O. Box 1054, Bismarck, ND 58502.

Dated this 2nd of February, 2005.

s/Ronda Colby
Ronda Colby

Subscribed and sworn to before me this 2 day of February, 2005.

s/[Illegible]
Notary Public
Burleigh County,
North Dakota
My Commission Expires:
4/12/08

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THIS CASE

U.S. Const. art VI, cl. 2.

This Constitution, and the laws of the United States which shall be made in pursuance thereof . . . shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.

Telephone Consumer Protection Act of 1991

47 U.S.C. § 227

* * *

(b) Restrictions on use of automated telephone equipment

(1) Prohibitions

It shall be unlawful for any person within the United States, or any person outside the United States if the recipient is within the United States--

* * *

(B) to initiate any telephone call to any residential telephone line using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party, unless the call is initiated for emergency purposes or is exempted by rule or order by the Commission under paragraph (2)(B);

* * *

(2) Regulations; exemptions and other provisions

The Commission shall prescribe regulations to implement the requirements of this subsection. In

implementing the requirements of this subsection, the Commission—

* * *

(B) may, by rule or order, exempt from the requirements of paragraph (1)(B) of this subsection, subject to such conditions as the Commission may prescribe--

(i) calls that are not made for a commercial purpose;

* * *

(e) Effect on State law

(1) State law not preempted

Except for the standards prescribed under subsection (d) of this section and subject to paragraph (2) of this subsection, nothing in this section or in the regulations prescribed under this section shall preempt any State law that imposes more restrictive intrastate requirements or regulations on, or which prohibits--

(B) the use of artificial or prerecorded voice messages;

* * *

North Dakota Century Code § 5-28-02

Use of prerecorded or synthesized voice messages. A caller may not use or connect to a telephone line an automatic dialing-announcing device unless the subscriber has knowingly requested, consented to, permitted, or authorized receipt of the message or the message is immediately preceded by a live operator who obtains the subscriber's consent before the message is delivered. This section and section 51-28-05 do not apply to a message from a public safety agency notifying a person of an emergency; a message from a school district to a student, a parent, or an employee; a message to a subscriber with whom the caller has a current business relationship; or a message advising an employee of a work schedule.

Supreme Court, U.S.
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No. 06-127

In the Supreme Court of the United States

FREEEATS.COM, INC.,

Petitioner,

v.

STATE OF NORTH DAKOTA EX REL.
WAYNE STENEHJEM, ATTORNEY GENERAL,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of North Dakota

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether North Dakota Century Code § 51-28-02 governing prerecorded voice messages directed to North Dakota telephone subscribers is preempted by the Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, 105 Stat. 2394 (1991) codified at 47 U.S.C. § 227, and the implementing rule adopted by the Federal Communications Commission, 47 C.F.R. § 64.1200(a)(2)(ii) (2005), as applied to interstate telephone calls.

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STATEMENT OF FACTS

The State of North Dakota ("North Dakota") and the United States Congress enacted legislation with identical consumer protection objectives: reducing intrusive and unwelcome prerecorded message telephone calls. Congress established minimum protections – gap-fillers for States without legislation. North Dakota, like many States, afforded its residents greater protections consistent with Congressional intent and the Supremacy Clause. Petitioner FreeEats.com, Inc. ("FreeEats") seeks to prevent North Dakota, a sovereign entity, from exercising traditional police powers to ensure the health, safety, welfare and privacy of its citizens.

1. Telephone Consumer Protection Act Of 1991

The Telephone Consumer Protection Act of 1991, 47 U.S.C. § 227 ("TCPA") amended the Federal Communications Act, 47 U.S.C. § 151, et seq. ("FCA"), to address telemarketing practices, including automated calls. "Evidence compiled by the Congress indicates that residential telephone subscribers consider automated or prerecorded telephone calls, regardless of the content or the initiator of the message, to be a nuisance and an invasion of privacy." Pub. Law 102-243, 1991 S 1462, § 2(10)(December 20, 1991). See also Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Report and Order, 18 FCC Rec. 14014, ¶137 (2003)("TCPA Order")(consumers complain about exemptions for noncommercial prerecorded calls).

"[W]e believe that the record demonstrates that telemarketing calls are a substantial invasion of residential privacy, and regulations that address this problem serve a substantial government interest." TCPA Order at ¶66; In re Telephone Consumer Protection Act of 1991 Automated Telephone Consumer Protection Act, S. Rep. 102-178, 1991 USCCAN 1968, 1972 (1991)("it is legitimate and consistent with the constitution to impose greater restrictions on automated calls than on calls placed by 'live' persons").

> Congress found that "residential telephone subscribers consider automated or prerecorded telephone calls ... to be a nuisance and an invasion of privacy." It also found that "[b]anning such automated or prerecorded telephone calls to the home, except when the receiving party consents to receiving the call or when such calls are necessary in an emergency situation affecting the health and safety of the consumer, is the only effective means of protecting telephone consumers from this nuisance and privacy invasion." Congress determined that such prerecorded messages cause greater harm to consumers' privacy than telephone solicitations by live telemarketers.

TCPA Order at ¶139 (quoting Pub. Law 102-243, § 2(12)(footnotes omitted)(emphasis added).

The TCPA granted the Federal Communications Commission ("FCC") authority to regulate such calls. The FCC chose not to ban prerecorded calls altogether, but instead allowed broad exceptions, e.g. calls not made for a commercial purpose and calls for a commercial purpose but which do not include unsolicited advertisements. See 47 CFR § 64.1200.

Fortunately for consumers, the TCPA "savings clause," 47 U.S.C. § 227(e)(1), confirmed or "saved" certain rights of the States, allowing them to continue to exercise traditional police powers.[1] States may pursue two courses of action without

---

[1] 47 U.S.C. § 227(e)(1) reads:

(e) Effect on State law

(1) State law not preempted

Except for the standards prescribed under subsection (d) of this section and subject to paragraph (2) of this subsection, nothing in this section or in the regulations prescribed under this section shall preempt any State law that imposes more restrictive intrastate requirements or regulations on, or which prohibits--

(A) the use of telephone facsimile machines or other electronic devices to send unsolicited advertisements;

running afoul of federal preemption: States may impose more restrictive intrastate requirements or regulations on certain practices or the States may prohibit certain practices outright, whether the calls are inter- or intrastate in origin.

2. North Dakota's Do Not Call Law

In 2003 the North Dakota Legislature went the route Congress suggested, prohibiting unwanted prerecorded calls. It passed the "Do Not Call" law, which included NDCC § 51-28-02 (2003)[2]:

> **Use of prerecorded or synthesized voice messages.** A caller may not use or connect to a telephone line an automatic dialing-announcing device[3] unless the subscriber has knowingly requested, consented to, permitted, or authorized receipt of the message or the message is immediately preceded by a live operator who obtains the subscriber's consent before the message is delivered. This section and section 51-28-05 do not apply to messages from school districts to students, parents, or employees, messages to subscribers with whom the caller has a current business relationship, or messages advising employees of work schedules.

Section 51-28-02, like the TCPA, is a consumer protection statute defending the privacy of consumers and preventing the

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(B) the use of automatic telephone dialing systems;

(C) the use of artificial or prerecorded voice messages; or

(D) the making of telephone solicitations.

[2] FreeEats cites a more recent version of the statute, amended in 2005. Pet. App. 41a. North Dakota reproduces herein the text of § 51-28-02 as it existed at the time of the violations and enforcement action.

[3] "'Automatic dialing-announcing device' ["ADAD"] means a device that selects and dials telephone numbers and that, working alone or in conjunction with other equipment, disseminates a prerecorded or synthesized voice message to the telephone number called." NDCC § 51-28-01(1).

burdensome and annoying consequences of prerecorded calls.

> Throughout our history the several States have exercised their police powers to protect the health and safety of their citizens. Because these are "primarily, and historically, ... matter[s] of local concern," Hillsborough County v. Automated Medical Laboratories, Inc., 471 U.S. 707, 719 ... (1985), the "States traditionally have had great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons," Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 756 ... (1985)[.]

Medtronic, Inc. v. Lohr, 518 U.S. 470, 475 (1996); Fraternal Order of Police v. Stenehjem, 431 F.3d 591, 597 (8th Cir. 2005) cert. denied 126 S.Ct. 2058 (2006)(North Dakota's regulation of telemarketing advances a significant government interest, consumer privacy).

The FCC, discussing the implementation of the TCPA, declared, "[S]tates have a long history of regulating telemarketing practices, and we believe that it is critical to combine the resources and expertise of the state and federal governments to ensure compliance with the national do-not-call rules. Indeed, the TCPA specifically outlines a role for the states in this process. See 47 U.S.C. 227(e) and (f)." Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, 68 Fed. Reg. 44144-01 at 44154, ¶53.

> Many state and consumer commenters note, however, that the TCPA contemplates a role for the states in regulating telemarketing and specifically prohibits preemption of state law in certain instances. States and consumers note that state do-not-call regulations have been a successful initiative in protecting consumer privacy rights. In addition, several commenters note the importance of federal and state cooperation in enforcing the national do-not-call regulations. The

> record also indicates that states have historically enforced their own state statutes within, as well as across state lines. The statute also contains a savings clause for state proceedings to enforce civil or criminal statutes, and at least one federal court [Van Bergen v. Minnesota, 59 F.3d 1541 (8th Cir. 1995)] has found that the TCPA does not preempt state regulation of autodialers that are not in actual conflict with the TCPA.

TCPA Order at ¶78 (emphasis added)(footnotes omitted).

North Dakota, and the Dakota Territory before it, has regulated aspects of telecommunications for 140 years, since before the invention of the telephone in 1876. See e.g. NDCC Chs. 49-02 and 49-21. As early as 1865 there were laws making injury to telegraph lines and interception of telegraph messages a crime. Laws of Dakota § 695 (Dak. Terr. 1864-65).

3. North Dakota's Enforcement Action

In August 2004 North Dakota received complaints about FreeEats' use of prerecorded messages. North Dakota sued FreeEats to enforce NDCC § 51-28-02 and prevailed at the trial court. North Dakota offered to stipulate to judgment for the equivalent of five violations (at $2,000 per violation) plus an amount for attorney fees and costs.[4] FreeEats accepted the offer and appealed the case to the North Dakota Supreme Court, which affirmed summary judgment.

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[4] In their Petition FreeEats quantifies for the first time its attempts to call "each of the 235,000 households in North Dakota with a publicly-available, listed telephone number." Pet. 8, n.4.

REASONS FOR DENYING THE PETITION

None of the considerations identified in Supreme Court Rule 10 are satisfied.

I. The North Dakota Supreme Court Decision Does Not Conflict With Prior Decisions Of This Court, The United States Courts Of Appeal Nor Any State Court of Last Resort

A. The Only Conflicting Decision On Point Is From A Single U.S. District Court

FreeEats argues, "The Supreme Court of North Dakota explicitly declined to follow the decision of the only federal court that has considered whether the TCPA saving clause avoids preemption of State laws that conflict with the statute as applied to interstate calls. (App. 26a (declining to follow Chamber of Commerce v. Lockyer, 2006 WL 462482[, 2:05-CV-2257-MCE-KJM] (E.D. Cal. Feb. 2[7], 2006)))." Pet. 12. Lockyer, an unpublished and unappealed U.S. District Court decision, does not present a conflict worthy of this Court's attention. For reasons of their own, the parties settled that case and stipulated to entry of final judgment. See Stipulation For Order Disposing of Pending Motions and Granting Permanent Injunction (May 31, 2006); Order Disposing of Pending Motions and Granting Permanent Injunction, 2006 WL 1629053 (June 9, 2006).

North Dakota's Supreme Court appropriately considered and rejected Lockyer: "The court's decision in Lockyer was premised upon its conclusion that the presumption against preemption does not apply and upon a strained reading of the language of 47 U.S.C. § 227(e)(1). We decline to follow Lockyer." State ex rel. Stenehjem v. FreeEats.com, Inc., 2006 ND 84, 712 N.W.2d 828 (N.D. 2006), Pet. App. 26a. The decision erroneously framed the issue as one of customary telecommunications regulation rather than as an issue of consumer protection and privacy. Had the question been properly framed as one of exercise of traditional State police

powers, the Lockyer court could not have dismissed the presumption against preemption as it did.

Lockyer rationalized its conclusion by saying its rendition of § 227(e)(1) avoids surplusage. Lockyer, 2006 WL 462482 at *8. The opposite is true; under the new interpretation the word "prohibits" becomes surplusage. If the statute merely "salvages" the State's right to apply "more restrictive" regulations on intrastate calls, then of what use is the word "prohibits"? A prohibition on intrastate calls would necessarily be a "more restrictive" State regulation, thus already allowed under the "salvaged" intrastate powers. The only way to avoid rendering "prohibits" surplusage is to apply it also to the remaining class of calls – interstate.

The intrastate language of § 227(e)(1) is not surplusage; it serves a purpose. With the Lockyer court's acknowledgment that there is no field preemption by the TCPA (2006 WL 462482 at *5), there is a logical explanation for the intra- and interstate distinctions. North Dakota's Supreme Court said:

> FreeEats contends that one important policy basis for enactment of the TCPA was to alleviate the excessive burdens which might be placed upon interstate telemarketers if they were required to comply with a plethora of conflicting regulations from all fifty states. In this context, there may be a substantial difference between the effect of state laws which seek to impose voluminous regulations upon interstate calls and those which wholly prohibit a specific class of interstate calls.

FreeEats.com, Inc., Pet. App. 11a. Under the TCPA a potential interstate caller need only know whether prerecorded calls are prohibited by a State's law. In States not prohibiting prerecorded calls, telemarketers can make calls consistent with TCPA regulations. But, if a State prohibits prerecorded calls, telemarketers simply must take care not to make prerecorded calls to that State. If 10 States prohibit prerecorded interstate

calls, that does not subject telemarketers to 10 different sets of State regulations. As a practical matter, this does not create any patchwork of inconsistent and confusing regulations from State to State.[5] Moreover, the provision gives guidance to States that engage in intra- and interstate-call regulation, and minimizes the potential of running afoul of conflict preemption, e.g. creating regulations which stand as an obstacle to the accomplishment and execution of the objectives of Congress.

B. The Supreme Court Cases Cited By FreeEats Are Not In Conflict

FreeEats claims the North Dakota Supreme Court decision conflicts with United States v. Locke, 529 U.S. 89 (2000) and City of New York v. FCC, 486 U.S. 57 (1988), which "establish the principles governing preemption of a State law that applies to interstate telephone service, an area long regulated at the federal level." Pet. 9-10. FreeEats fails to clearly identify the conflict. While both cases may contain some fodder for FreeEats' preemption arguments, neither is on point nor in actual conflict with FreeEats.com, Inc

In Locke, oil tanker operators sought relief from a State of Washington law providing for more stringent regulations governing tankers and oil spills. The issue was whether State regulations were preempted by the federal Ports and Waterways Safety Act of 1972, Pub.L. 92-340, July 10, 1972, 86 Stat. 424 ("PWSA"). The Court's holding was mixed. On the one hand, the Court held Title I of the PWSA allows a state to regulate its ports and waterways, so long as the regulation is based on the peculiarities of local waters and is not in conflict with federal law. However, under Title II of the PWSA only the federal government may regulate the design, construction,

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[5] This also addresses FreeEats' argument that the North Dakota Supreme Court's rendering of the statue leads to an absurd result. FreeEats.com, Inc., Pet. App. 11a.

alteration, repair, maintenance, operation, equipping, personnel qualification and manning of tanker vessels. Consequently, Washington's tanker regulations regarding general navigation watch procedures, English language skills, training and casualty reporting were preempted by Title II under a theory of field preemption. The Court remanded the case to determine whether the remaining regulations were allowed under Title I, i.e. based on the peculiarities of local waters and not in conflict with federal law.

FreeEats argues the North Dakota Supreme Court erred by not heeding Locke's conclusion that "an 'assumption' of nonpre-emption is not triggered when the State regulates in an area where there has been a history of significant federal presence." Pet. 18. In fact, the North Dakota Supreme Court recognized that conclusion, applied it to the facts of the instant case and determined that the instant case - which involves the exercise of traditional police powers - did not warrant abrogation of the "assumption of nonpre-emption." FreeEats.com, Inc., Pet. App. 14a-16a. "As noted by the United States Supreme Court, when considering preemption a court must 'start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'" Id. at 15a-16a (citing City of Columbus v. Ours Garage & Wrecker Serv., Inc., 536 U.S. 424, 432 (2002)(quoting Wisconsin Pub. Intervenor v. Mortier, 501 U.S. 597, 605 (1991))). See also Medtronic, 518 U.S. at 485; Hillsborough County, 471 U.S. at 716; Cipollone v. Liggett Group, Inc., 505 U.S. 504, 516 (1992); Bates v. Dow Agrosciences LLC, 544 U.S. 431, 448-49 (2005).

In Locke this Court found that in the field of maritime regulations there was more than just a "significant federal presence." It held "Congress has left no room for state regulation of these matters. See Fidelity Fed. Sav. & Loan Assn. v. de la Cuesta, 458 U.S. 141 ... (1982)(explaining field

pre-emption)." Locke, 529 U.S. at 111. The North Dakota Supreme Court properly concluded the TCPA did not result in field preemption; accordingly it did apply the proper standard regarding "assumption of nonpre-emption."

FreeEats also argues that, under Locke, a "savings clause" should not be given broad effect where doing so would "upset the careful regulatory scheme established by federal law." Pet. 21. Again FreeEats' assertion begs the question. Here, "the careful regulatory scheme" established by Congress, and acknowledged by the FCC, includes a well-defined role for States to exercise concurrent jurisdiction in the dual State/federal system for regulating telecommunications. Louisiana Pub. Serv. Comm'n v. FCC, 476 U.S. 355, 360, 371, 375 (1986). See also Section III.B, infra.

In City of New York, cable television franchisors sought judicial review of FCC regulations establishing technical standards to govern the quality of cable television signals, squarely falling within the FCC's core mission to facilitate access and service to telecommunications. See e.g. Pet. 18-19 ("Section 1 of the Communications Act, 47 U.S.C. § 151, charges the agency with ensuring efficient, nationwide phone service. See Louisiana Public Service, 476 U.S. at 370."). The issue was whether the FCC exceeded its authority by preempting state and local technical standards governing the quality of cable television signals; the Court ruled it did not.

This Court noted the focus is on the agency and the proper bounds of its authority to undertake such action. If the agency's decision to preempt represents a reasonable accommodation of conflicting policies committed to the agency's care by statute, the accommodation should not be disturbed "'unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned.' United States v. Shimer, 367 U.S. 374 ... (1961); see also [Capital Cities Cable, Inc. v.] Crisp, ... 467

U.S. [691 (1984)], at 700[.]" City of New York, 486 U.S. at 64.

In short, City of New York stands for the unremarkable proposition that where Congress intends to preempt State law, it may do so. Here Congress did not intend to preempt the State law at issue; there is no conflict.

C. North Dakota's Analysis Is Consistent With Two Other State Supreme Courts, Five United States Circuit Courts Of Appeal And At Least Two Federal District Courts

Not only is there no conflict between FreeEats.com, Inc. and any other State court of last resort nor U.S. Court of Appeals, there are several decisions at those levels which are in accord with, or support the reasoning of, the North Dakota Supreme Court decision.

The Utah Supreme Court in Utah Div. of Consumer Protection v. Flagship Capital, 2005 UT 76, 125 P.3d 894 (Utah 2005) ruled Utah's exercise of police power to impose restrictions on interstate call autodialers was not preempted by the TCPA.

Addressing whether the TCPA preempts application of state telemarketing laws to interstate telemarketing calls, the Supreme Court of Utah reasoned:

> Close examination of the Utah laws shows that they are not in conflict with the TCPA, nor do they stand as an obstacle to the accomplishment and full objective of federal law. We see no reason why telemarketing companies would be unable to comply with both the Utah laws and the federal statutes. This intention of the Utah legislature is made clear by Utah Code section 13-25a-103(4), which reads: "A person may not make or authorize a telephone solicitation in violation of Title 47 U.S.C. 227." The telemarketing standards set by our legislature are stricter than, but do not directly conflict with, the federal standards. A telemarketer who

> complies with the Utah standards will have little difficulty complying with the federal standards. Moreover, the record does not reflect that a national telemarketer would confront any substantial hardship by being required to determine which of its calls reach the telephones of Utah residents. Therefore, the Utah law does not force a telemarketer to conform its nationwide practices with Utah standards in order to prevent an inadvertent violation. The telemarketer can simply identify those calls that would be made to Utah and choose to not make those calls or to conform those calls to the Utah regulations. That the TCPA creates a uniform nationwide minimum set of prohibited telemarketing activities does not mean that Utah's heightened standard for companies wishing to make phone calls to this state conflicts with the federal scheme.

FreeEats.com, Inc., (quoting Flagship Capital, 2005 UT 76, ¶22 (footnote omitted)). Pet. App. 22a-23a.

Further, in Chair King, Inc. v. GTE Mobilnet of Houston, Inc., 184 S.W.3d 707 (Tex. 2006), the Texas Supreme Court primarily private enforcement of the unsolicited fax provisions of the TCPA. The court said "Section 227(e) [the savings clause] provides that the TCPA does not preempt state laws imposing more restrictive requirements or even prohibiting the use of telemarketing equipment." Id., 184 S.W.3d at 717. The Texas court continued, "First, we note that section 227(e)(1) is specifically titled "State law not preempted." 47 U.S.C. § 227(e)(1)(emphasis added). Furthermore, Congress's intent to supplement state legislation explains why the preemption concern would have focused on more aggressive regulation by the states." Id. at 718. "Congress clearly did not intend the TCPA to establish a ceiling if states decided to be more aggressive in their approach[.]" Id.

More than ten years ago, in Van Bergen v. Minnesota, 59

F.3d 1541 (8th Cir. 1995), the Eighth Circuit addressed TCPA preemption with respect to the Minnesota statute regulating automatic dialing-announcing device calls, and did so in the context of political calls in support of a gubernatorial candidate.[6] The case is almost exactly on point. The Eighth Circuit held the TCPA does not preempt State law prohibiting prerecorded messages.[7]

The Eighth Circuit comprehensively analyzed and rejected express, field and conflict preemption. Van Bergen, 59 F.3d at 1547-48. Moreover, it considered and rejected First Amendment arguments similar to those mentioned by FreeEats. Id. at 1550. Importantly, the Eighth Circuit concluded

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[6] Minn. Stat. § 325E.27 is virtually identical to NDCC § 51-28-02 and served as the model for the North Dakota law.

[7] Recognizing the fatal consequences of Van Bergen, FreeEats misstates the Record in this case, representing, "The record before the Supreme Court of North Dakota demonstrated that the calls at issue in Van Bergen were intrastate in nature." Pet. 24 n.8. That is simply not true. The lower court in Van Bergen said there was no evidence the plaintiff intended to connect his ADAD machine to telephone lines anywhere other than Minnesota, accordingly, he did not have standing to address the preemption issue on behalf of some unknown third party. Appellant's [Supreme Court of North Dakota] Reply Brief, Addendum at 10-13. Regardless, the Eighth Circuit was free to address the issue, and unequivocally did so. See e.g. Wilson v. Zoellner, 114 F.3d 713, 715 (8th Cir. 1997)(district court's decision on preemption is reviewed de novo because it is a question of federal law involving statutory interpretation). In Van Bergen, the Eighth Circuit addressed preemption as one of three threshold issues and concluded there was no preemption. Van Bergen, 59 F.3d at 1546.

Moreover, if it was true that the case only implicated intrastate calls, why did the Eighth Circuit go to the trouble of addressing and dismissing the preemption issue? If the calls were intrastate, the TCPA exception allowing for more restrictive intrastate regulations would, without question, have allowed Minnesota to do what it was doing - there would have been no reason for the Court to address preemption. The trial court adopted this reasoning in the instant case. App. 33a.

Congress enacted the TCPA as a "gap filler," not to preempt State law.

> The congressional findings appended to the TCPA state that "[o]ver half the States now have statutes restricting various uses of the telephone for marketing, but telemarketers can evade their prohibitions through interstate operation; therefore, Federal law is needed to control residential telemarketing practices." 47 U.S.C. § 227, Congressional Statement of Findings (7). This finding suggests that the TCPA was intended not to supplant state law but to provide interstitial law preventing evasion of state law by calling across state lines.

Van Bergen, 59 F.3d at 1548.

The Fourth Circuit, in International Science & Tech. Inst., Inc., v. Inacom Communication, Inc., 106 F.3d 1146, 1153 (4th Cir. 1997) also held the TCPA does not preempt State law:

> In any event, International Science's preemption argument must be rejected at its beginning because Congress stated that state law is not preempted by the TCPA. See 47 U.S.C. § 227(e) ("nothing in this section ... shall preempt any State law that imposes more restrictive intrastate requirements ... or which prohibits" certain enumerated practices (emphasis added)).

International Science, 106 F.3d at 1153 (emphasis in original). The Fourth Circuit, and several other cases cited in this section, reached their conclusions using the same grammatical construction of the savings clause employed by the North Dakota Supreme Court and trial court, the construction FreeEats contends leads to an "absurd result." Pet. 20.

> The Eleventh Circuit adopted the Fourth Circuit's analysis: The Fourth Circuit rejected the argument that Congress intended to establish concurrent jurisdiction manifested through its preemptive occupation of interstate

> telecommunications for two reasons. Id. at 1153. First, it determined that even if the Act preempted substantive state law, the Act specifically provided for state courts to hear cases under the Act unless there was a contrary congressional intent. Id. Second, it noted that the Act specifically held that it did not preempt any state law that imposed more restrictive intrastate requirements or which prohibited certain practices. Id.

Nicholson v. Hooters of Augusta, Inc., 136 F.3d 1287, 1289 (11th Cir. 1998)(citing International Science).

The Fifth Circuit also adopted the reasoning of International Science:

> The history and purpose of this statute provide further support for the conclusion that Congress intended to confer exclusive jurisdiction upon the state courts. Congress enacted the TCPA as a supplement to state efforts to regulate telemarketing activities. This nonconsensual telemarketing activity was viewed by Congress as an invasion of privacy, an impediment to interstate commerce, and a disruption to essential public safety services. S. Rep. No. 178, 102nd Cong., 1st Sess. 1, 5 (1991), reprinted in 1991 U.S.C.C.A.N. 1968, 1973. Congressional action was needed as states had no independent regulatory power over interstate telemarketing activities. Id., 47 U.S.C. § 227, Congressional Finding No. 7. By creating a private right of action in state courts, Congress allowed states, in effect, to enforce regulation of interstate telemarketing activity.

Chair King, Inc. v. Houston Cellular Corp., 131 F.3d 507, 513 (5th Cir. 1997).

The Third Circuit confirms the TCPA simply does not cast as long a shadow as FreeEats suggests and rejected field preemption:

> Furthermore, the statute does not appear to reflect any

> significant federal interest, or one that is uniquely federal. It does not reflect an attempt by Congress to occupy this field of interstate communication or to promote national uniformity of regulation. Rather, Congress recognized that state regulation of telemarketing activity was ineffective because it could be avoided by interstate operations.

ErieNet, Inc. v. Velocity Net, Inc., 156 F.3d 513, 516 (3d Cir. 1998)(emphasis added).

The five U.S. Courts of Appeals to address the TCPA preemption issue have come down against wholesale preemption. Congress intended to enhance State enforcement, not impair it:

> Indeed, from top to bottom, the private TCPA action reflects Congress' intent to enhance state sovereignty. Congress enacted the TCPA to assist states where they lacked jurisdiction; it empowered states themselves to enforce the TCPA in federal court; it authorized private enforcement exclusively in state courts; and it recognized state power to reject Congress' authorization.

International Science, 106 F.3d at 1158.[8]

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[8] See also Florida v. Sports Auth. Florida, Inc., U.S. Dist. Ct., M. D. Fla., Case No. 6:04-CV-115-Orl-JGG, Order (June 4, 2004) at 5-6 ("In other words, while the Sports Authority points to the TCPA as preempting the state-law unsolicited-sales-call and improper-use-of-prerecorded-messages claims against it, the TCPA itself expressly disavows any intent to preempt such claims. See 47 U.S.C. § 227(e)(1)(B), (C) and (D)")(emphasis in original); North Carolina v. Debt Management Found. Serv., Inc., U.S. Dist. Ct., E. D. N.C., Case No. 5:03-CV-950-FL(3), Order (March 8, 2004) at 16-17 ("Weighing further against complete preemption by the TCPA, the act explicitly recognizes several areas in which state law is not preempted. In particular, 'nothing in [the TCPA] shall preempt any State law that imposes more restrictive intrastate requirements or regulations on, or which prohibits ... (C) the use of artificial or prerecorded voice messages[']")(emphasis in

II. The Issue Does Not Rise To The Level Of An Important Question Of Federal Law That Should Be Settled By This Court

Congress passed the Telephone Consumer Protection Act, not the Telemarketers Protection Act. As stated by FreeEats, "Since 1992, many States have adopted laws that restrict telemarketing calls to their residents, including calls with prerecorded messages. Many of these statutes apply to both interstate and intrastate calls, without distinction." Pet. 6. For 14 years telemarketers have been operating within these restrictions, apparently without the political process grinding to a halt and without the telemarketing industry collapsing in financial ruin. The FCC itself long ago prevailed against an attempt to declare TCPA restrictions on prerecorded messages invalid:

> That some companies prefer the cost and efficiency of automated telemarketing does not prevent Congress from restricting the practice. Kovacs v. Cooper, 336 U.S. 77, 88-89 ... (1949)("That more people may be more easily and cheaply reached ... is not enough to call forth constitutional protection for what those charged with public welfare reasonably think is a nuisance when easy means of publicity are open.").

Moser v. FCC, 46 F.3d 970, 975 (9th Cir. 1995), cert. denied 515 U.S. 1161 (1995). The same holds true for North Dakota's statute.

FreeEats turns the issue on its head, complaining North

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original)(citing 47 U.S.C. § 227(e)) and at 17-18 ("Accordingly, the court finds no clear intent on the part of Congress to prevent states from bringing state law causes of action against interstate telemarketers in state court."). The North Carolina case uses the same grammatical construction as North Dakota and reaches the same conclusion. Copies of the Orders are in the North Dakota Supreme Court Record on Appeal at #79. These two cases are also cited by FreeEats, but for different reasons. Pet. 26 n.17.

Dakota's Do Not Call law compromises the FCC's authority. The reality is that Congress, the source for all FCC authority, recognized the value of having States exercise traditional police powers in conjunction with the FCC's ability to deploy minimum protections for States which do not have their own statutes. This is consistent with long-established and well-founded principles of Federalism and the recognition of States as sovereign entities. The only question is whether Congress, invoking the Supremacy Clause and expressing its will through the TCPA, intended to prevent States from exercising police powers. The numerous courts approaching the issue, with the sole exception of Lockyer, find no such intent.

Complaints about the hypothetical destruction of "uniform national standards" are not supported by the record, nor are they persuasive. The Congressional findings of the TCPA do not mention uniformity. Pub. L. 102-243, § 2. See also United States v. Kimbell Foods, Inc., 440 U.S. 715, 730 (1979)(rejecting "generalized pleas for uniformity" as basis for creating federal common law). It is not enough to suggest the FCC would prefer uniformity. "To permit an agency to expand its power in the face of a congressional limitation on its jurisdiction would be to grant to the agency power to override Congress. This we are both unwilling and unable to do." Louisiana Pub. Serv. Comm'n, 476 U.S. at 374-75. The perceived administrative interest in uniformity ends where the State's interest in self-determination begins. U.S. Constitution, Amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or the people.").

FreeEats attempts to inflate the importance of this case by cloaking it in the mantle of free speech. In a rather cursory manner FreeEats mentioned the First Amendment at the trial court level; however, the issue was convincingly dispatched through summary judgment and FreeEats did not appeal the issue to the North Dakota Supreme Court. Pet. App. 33a-36a.

This is not a case about freedom fighters for democracy, this is a case about a trade group of telemarketers anxious to minimize accountability and maximize profits at the expense of compelling government interests such as the safety and privacy of its citizens.

Finally, it is worth noting FreeEats has a petition for declaratory order pending before the FCC on the very issue at the heart of this case – whether North Dakota's § 51-28-02 is preempted by the TCPA. Pet. 29. North Dakota believes the FCC should decide the question consistent with the various State Supreme Courts and federal Circuit and District Courts that have addressed it and not found preemption. The issue is still working its way through that process and, as the FCC decision is appealable to a Circuit Court of Appeals, it is reasonable to surmise the losing party at the FCC level will seek judicial review. 47 U.S.C. § 402.

Then, the Court of Appeals will decide either (1) there is no preemption, confirming FreeEats' Petition need not have been taken up by this Court at this time; or (2) North Dakota's law is preempted, setting up a much more apt Supreme Court Rule 10(b) question – three State courts of last resort having decided an important federal question in a way that conflicts with the decision of a United States Court of Appeals.

III. The Decision Of The Supreme Court Of North Dakota Is Well Reasoned And Correct

A. The Plain Language Of The TCPA Controls

The Supreme Court has concluded that "vague notions of a statute's 'basic purpose' are . . . inadequate to overcome the words of its text regarding the specific issue under consideration." Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204, 220 (2002) (quoting Mertens v. Hewitt Assocs., 508 U.S. 248, 261 (1993)). It is not a court's function "to find reasons for what Congress has plainly done," but rather the court's job is to "avoid rendering what Congress has plainly

> done . . . devoid of reason and effect." Great-West, at 217-18. It is for Congress, not the courts, to amend a statute if the plain language of the statute does not accurately reflect the true intent of Congress. See Dodd [v. United States, 125 S.Ct. 2478 (2005)], at 2483. As noted by the Supreme Court in Carter v. United States, 530 U.S. 255, 271 (2000)(citation omitted)(quoting Bank One Chicago, N.A. v. Midwest Bank & Trust Co., 516 U.S. 264, 279 (1996)(Scalia, J., concurring)), when construing a statute a court must "begin by examining the text, not by 'psychoanalyzing those who enacted it.'"

FreeEats.com, Inc., Pet. App. 9a-10a (emphasis in original). North Dakota's Supreme Court correctly found the TCPA savings clause at 47 U.S.C. § 227(e) was unambiguous and its plain language allowed for enforcement of NDCC § 51-28-02.

> When Congress has considered the issue of pre-emption and has included in the enacted legislation a provision explicitly addressing that issue, and when that provision provides a "reliable indicium of congressional intent with respect to state authority," Malone v. White Motor Corp., 435 U.S. [497 (1978)], at 505 ... "there is no need to infer congressional intent to pre-empt state laws from the substantive provisions" of the legislation. California Federal Savings & Loan Assn. v. Guerra, 479 U.S. 272, 282 ... (1987)[.]

Cipollone, 505 U.S. at 518. In the TCPA just such a provision can be found in the savings clause, where certain State rights are "saved" from preemption.

The TCPA provides options. States may impose more restrictive intrastate requirements or regulations on certain practices or States may prohibit those practices outright. Presumably a State could adopt more restrictive intrastate regulations but allow the TCPA to serve as the default for interstate calls; however, a State is not required to do so.

The savings clause, 47 U.S.C. § 227(e)(1), says:

(e) Effect on State law

(1) State law not preempted

Except for the standards prescribed under subsection (d) of this section and subject to paragraph (2) of this subsection, nothing in this section or in the regulations prescribed under this section shall preempt any State law that imposes more restrictive intrastate requirements or regulations on, or which prohibits-- ... (C) the use of artificial or prerecorded voice messages

(emphasis added).

The North Dakota Supreme Court held:

> The word "or" is disjunctive in nature and ordinarily indicates an alternative between different things or actions. Reiter v. Sonotone Corp., 442 U.S. 330, 338-39 (1979). ... Terms or phrases separated by "or" have separate and independent significance. Reiter, at 338-39. Coupled with the comma preceding "or," which indicates a separate clause, the statutory language clearly creates two distinct and independent phrases. Thus, read logically and grammatically, the statute states that nothing in the TCPA preempts any state law "that imposes more restrictive intrastate requirements or regulations on" the enumerated classes of calls, and nothing in the TCPA preempts any state law "which prohibits" calls within the enumerated list. "Intrastate" unambiguously modifies only the first clause, not the second. If Congress had intended that the second part of the statute apply only to intrastate calls, "it could simply have said that." Great-West, 534 U.S. at 218. Because the statutory text is unambiguous, our inquiry into its meaning ends there. Bedroc [Ltd. v. United States, 541 U.S. 176 (2004)] at 183.

FreeEats.com, Inc., Pet. App. 10a-11a (citations omitted).

Congress could have easily indicated the "intrastate" language applies to both "more restrictive ... requirements and regulations" and "prohibits"; but, it did not do so. Inclusio unius est exclusio alterius - "the expression of one thing is the exclusion of the other."

> "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." United States v. Wong Kim Bo, 472 F.2d 720, 722 (CA5 1972). ... Had Congress intended to restrict § 1963(a)(1) to an interest in an enterprise, it presumably would have done so expressly as it did in the immediately following subsection (a)(2).

Russello v. United States, 464 U.S. 16, 23 (1983)(citations omitted). "Any indulgence in construction should be in favor of the States, because Congress can speak with drastic clarity whenever it chooses to assure full federal authority, completely displacing the States." Bethlehem Steel Co. v. New York State Labor Relations Bd., 330 U.S. 767, 780 (1947).

In the Petition FreeEats offers another new reading of § 227(e)(1), this time purporting to find a contextual distinction between the use of the words "that" and "which" as in "nothing in this section or in the regulations prescribed under this section shall preempt any State law that imposes more restrictive intrastate requirements or regulations on, or which prohibits[.]" Petition 19-21. FreeEats argues, "This court's interpretation is based on an obvious grammatical mistake. Section 227(e)(1) does not introduce both clauses with the word 'that,' as would be required to create parallel clauses. Rather, it uses two different words, 'that' and 'which' to introduce these provisions; literally interpreted, the clauses are not parallel." This is a straw-man argument, set up by FreeEats just to knock down. In reality, the word "parallel" does not

appear anywhere in the North Dakota Supreme Court's decision; the concept is a false construct.

To frame the analogy more accurately, one would not characterize the clauses as "parallel" but rather "divergent" – one limited to intrastate calls the other covering both inter- and intrastate call. Further, FreeEats' proposed reading would render the words "or which prohibits" mere surplusage. Certainly an outright prohibition would be "a more restrictive intrastate requirement or regulation." There would be no need to add the redundant and superfluous phrase "or which prohibits." The FreeEats reading does not give effect to each word or phrase of the statute; it consciously ignores several.

In the Petition, FreeEats for the first time asserts the TCPA savings clause is ambiguous. Pet. 16. This is a 180-degree turn from its position in the Court below. At oral argument, in a colloquy with North Dakota Supreme Court Chief Justice VandeWalle as to whether the TCPA savings clause was ambiguous or clear, counsel for FreeEats admitted it was not ambiguous: "Well, your honor, I submit that it's clear and it's not ambiguous." See www.ndcourts.com/%5Fcourt/docket/20050171.htm, at hyperlink "Audio: Listen to recording of oral argument" at 3 minutes 00 seconds to 4 minutes 27 seconds into the recording of argument. The North Dakota Supreme Court noted, "FreeEats essentially ignores the language of the statute and bases its argument upon the contention that the legislative history demonstrates Congressional intent to preempt all state statutes affecting interstate calls." FreeEats.com, Inc., Pet. App. 10a. Even if, arguendo, the savings clause is ambiguous, the presumptions against preemption prevail. See Section III.C, infra.

Other provisions of the TCPA demonstrate Congress accepted separate State regulation. Section 227(b)(3) states, "A person or entity may, if otherwise permitted by the laws or rules of court of a State, bring in an appropriate court of that State – "an action for violation of the TCPA. (emphasis added).

The TCPA directs that FCC do not call regulations "be designed to enable States to use the database mechanism selected by the Commission for purposes of administering or enforcing State law." 47 U.S.C. § 227(c)(3)(J)(emphasis added). Also, "a State or local authority may not, in its regulation of telephone solicitations, require the use of any database, list, or listing systems that does not include the part of such single national database that relates to such State." 47 U.S.C. § 227(e)(2)(emphasis added). Section 227(f) gives Attorneys General authority to enforce the TCPA and saves their investigatory powers under State law. Section 227(f)(6) says, "Nothing contained in this subsection shall be construed to prohibit an authorized State official from proceeding in State court on the basis of an alleged violation of any general civil or criminal statute of such State."

B. The FCA Does Not Preempt All State Regulation

The Federal Communications Act is not the monolithic preemptive force that FreeEats argues. It is riddled with exceptions to "exclusive" federal jurisdiction over interstate calls. See e.g. 47 U.S.C. § 253(b)("Nothing in this section shall affect the ability of a State to impose ... requirements necessary to ... protect the public safety and welfare ... and safeguard the rights of consumers.") and 47 U.S.C. § 332, allowing for limited State regulation of mobile phones.

The FCA contains a general savings clause, 47 U.S.C. § 414, "Nothing in this chapter contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies." For example, the FCA does not preempt State law regarding invasion of privacy. Ashley v. Southwestern Bell Tel. Co., 410 F.Supp. 1389, 1392-93 (W.D. Tex. 1976). Laws forbidding telephone harassment, unfair, deceptive or fraudulent sales practices are not preempted. See e.g. Moriconi v. AT&T Wireless PCS, LLC, 280 F.Supp. 2d 867, 874-75 (E.D. Ark. 2003)(discussing "the overwhelming authority

declining to find complete preemption in the context of the FCA"); Pinney v. Nokia, Inc., 402 F.3d 430, 450 (4th Cir. 2005)("The presence of [§ 414] counsels against a finding that Congress intended to sweep aside all state claims in a particular area."). "The court in Castellanos v. U.S. Long Distance Corp., 928 F.Supp. 753 (N.D. Ill. 1996), took the import of the survival clause one step further and interpreted the clause to preserve state law claims alleging breach of the same duties that were created under the Act." DeCastro v. AWACS, Inc., 935 F.Supp. 541, 551-52 (D. N.J. 1996)(emphasis in original); see also City of Ellensburg v. King Videocable Co., 1993 WL 816526 (E.D. Wash. 1993); Lewis v. Nextel Comm., Inc., 281 F.Supp. 2d 1302, 1305 (N.D. Ala. 2003)(citing Smith v. GTE Corp., 236 F.3d 1292 (11th Cir. 2001))("the savings clause ... contemplates the application of state law and the exercise of state-court jurisdiction. ... If there is state-court jurisdiction the jurisdiction cannot be exclusively federal.").

In Head v. New Mexico Bd. of Exam'rs, 374 U.S. 424 (1963) the Court, citing § 414, rejected a preemption argument that would have prevented the State from regulating advertising just because the medium used was radio, ostensibly under the exclusive purview of the FCC.

> The nature of the regulatory power given to the federal agency convinces us that Congress could not have intended its grant of authority to supplant all the detailed state regulation of professional advertising practices, particularly when the grant of power to the Commission was accompanied by no substantive standard other than the "public interest, convenience, and necessity." The Solicitor General has conceded that the power of license revocation is not a plausible substitute for state law dealing with "traditional" torts or crimes committed through the use of radio. We can find no material difference with respect to the less 'traditional' statutory violation here involved. In the

> absence of positive evidence of legislative intent to the contrary, we cannot believe Congress has ousted the States from an area of such fundamentally local concern.

Head, 374 U.S. at 431-32 (emphasis added). In a concurrence, Justice Brennan recognized States' traditional police powers are not easily preempted.

> The New Mexico law is one designed principally to protect the State's consumers against a local evil by local application to forbid certain forms of advertising in all mass media. Such legislation, whether concerned with the health and safety of consumers, or with their protection against fraud and deception, embodies a traditional state interest of the sort which our decisions have consistently respected. Rice[v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947).]

Id. at 445. See also Marcus v. AT&T Corp., 138 F.3d 46, 54 (2d Cir. 1998)("federal common law does not completely preempt state law claims in the area of interstate telecommunications"); In Re Universal Serv. Fund Tel. Billing Practice Litig., 247 F.Supp. 2d 1215, 1221, 1226 (D. Kan. 2002)(FCA does not completely preempt State fraud claims); Minnesota v. WorldCom, Inc., 125 F.Supp. 2d 365, 372 (D. Minn. 2000)(permitting attorney general lawsuit for false advertising of interstate long-distance services); A.S.I. Worldwide Comm. Corp. v. WorldCom, Inc., 115 F.Supp. 2d 201, 207 (D. N.H. 2000)("I cannot reasonably infer that Congress manifested a clear intention to occupy the entire interstate telecommunications field to the exclusion of any state regulation in that area.").

C. There Are Strong Presumptions Against Preemption

"We begin with the axiom that, under our federal system, the States possess sovereignty concurrent with that of the Federal government, subject to only limitations imposed by the Supremacy Clause." Tafflin v. Levatt, 493 U.S. 455, 458

(1990). A court will not construe a federal statute to "upset the usual constitutional balance of federal and state powers" unless Congress "[made] its intention to do so unmistakably clear in the language of the statute." Gregory v. Ashcroft, 501 U.S. 452, 460 (1991)(citations omitted). The presumption is stronger regarding administrative regulations.

> We are even more reluctant to infer pre-emption from the comprehensiveness of regulations than from the comprehensiveness of statutes. As a result of their specialized functions, agencies normally deal with problems in far more detail than does Congress. To infer pre-emption whenever an agency deals with a problem comprehensively is virtually tantamount to saying that whenever a federal agency decides to step into a field, its regulations will be exclusive. Such a rule, of course, would be inconsistent with the federal-state balance embodied in our Supremacy Clause jurisprudence.

Hillsborough County, 471 U.S. at 717; see also New York Dept. of Social Services v. Dublino, 413 U.S. 405, 415 (1973). Merely because federal provisions are sufficiently comprehensive to meet the need identified by Congress does not mean States are barred from identifying additional needs or imposing further requirements in the field. Hillsborough County, 471 U.S. at 716. And, consumer protection laws enjoy an even greater presumption against preemption.

> Laws concerning consumer protection, including laws prohibiting false advertising and unfair business practices, are included within the states' police power, and are thus subject to this heightened presumption against preemption. (See California v. ARC America Corp. (1989) 490 U.S. 93, ... [unfair business practices]; Smiley v. Citibank (1995) 11 Cal.4th 138, 148, ... 900 P.2d 690 [consumer protection], affd. (1996) 517 U.S. 735[.]

Black v. Financial Freedom Senior Funding Corp., 112 Cal. Rptr. 2d 445, 452-53 (Cal. Ct. App. 2001).

D. There Is No Express Preemption

"[T]he question whether federal law in fact preempts state action in any given case necessarily remains largely a matter of statutory construction." L. Tribe, American Constitutional Law § 6-25, at 480 (2d ed. 1988); Guerra, 479 U.S. at 280 ("our sole task is to ascertain the intent of Congress."). There is nothing in the text of the TCPA supporting FreeEats' theory that Congress intended to preempt NDCC § 51-28-02. In fact, the heading of § 227(e)(1) is "State law not preempted." "The TCPA carries no implication that Congress intended to preempt state law; the statute includes a preemption provision expressly not preempting certain state laws." Van Bergen, 59 F.3d at 1548.

E. There Is No Field Preemption

Field preemption exists only "where the scheme of federal regulation is 'so pervasive as to make reasonable the inference that Congress left no room for the states to supplement it.'" Gade v. National Waste Mgmt. Sys., 505 U.S. 88, 98 (1972)(quoting de la Cuesta, 458 U.S. at 153). Federal occupation of a field is not easily accomplished:

> The principle to be derived from [our] decisions is that federal regulation of a field of commerce should not be deemed preemptive of state regulatory power in the absence of persuasive reasons – either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained.

Florida Lime & Avocado Growers v. Paul, 373 U.S. 132, 142 (1963).

It cannot be said that as a matter of law the FCA preempts the field of telecommunications. Even Lockyer, supra, reached the same conclusion:

> Plaintiff's argument, that States are devoid of authority

> to regulate interstate telecommunications, is simply too broad. In fact, as expressly noted above, the Supreme Court recognized that such a clean parceling of responsibility is unworkable. Id. In addition, there are many examples of Congressional intent to reserve certain rights to the States. For example, the FCA expressly reserves the right to "impose ... requirements necessary to ... protect the public safety and welfare ... and safeguard the rights of consumers" to States. 47 U.S.C.S. § 253(b).

Lockyer, 2006 WL 462482 at *5.

TCPA field preemption was rejected in Van Bergen, 59 F.3d at 1548, "the preemption provision [47 U.S.C. § 227(e)(1)] makes it clear that Congress did not intend to 'occupy the field' of ADAD regulation, ... or to promote national uniformity of ADAD regulation, as it expressly does not preempt state regulation of intrastate ADAD calls that differs from federal regulation." (citation omitted).

F. There Is No Conflict Preemption

Conflict preemption occurs where compliance with both federal and State laws is a physical impossibility, Florida Lime, 373 U.S. at 142-43, or where State law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Hines v. Davidowitz, 312 U.S. 52, 67 (1941). "The Court has observed repeatedly that pre-emption is ordinarily not to be implied absent an 'actual conflict.' See, e.g., Savage v. Jones, 225 U.S. 501 ... (1912)." English v. General Elec. Co., 496 U.S. 72, 90 (1990).

A state law is not invalid under the Supremacy Clause merely because it differs from federal law. See generally CTS Corp. v. Dynamics Corp., 481 U.S. 69 (1987). "Ordinarily, state causes of action are not preempted solely because they impose liability over and above that authorized by federal law." ARC America Corp., 490 U.S. at 105; see also Rousseff v. Dean Witter & Co., 453 F.Supp. 774, 782 (N.D. Ind.

1978)("where ... the state law enhances the primary and overall purpose of the federal law, it is not invalid under the Supremacy Clause.").

If it is possible to comply with both federal and state law, there is neither a conflict nor a frustrated purpose. See generally Rotunda, R. & Nowak, J., Treatise on Constitutional Law: Substance and Procedure, § 12 (2d ed. 1992 & Supp. 1993). The Eighth Circuit directly addressed, and rejected, conflict preemption between the TCPA and a law virtually indistinguishable from § 51-28-02. "It is clear that the Minnesota statute and the TCPA are designed to promote an identical objective, and that there is nothing in the two statutes that creates a situation in which an individual cannot comply with one statute without violating the other." Van Bergen, 59 F.3d at 1548. North Dakota's statute is virtually identical to the Minnesota Statute; the same result should obtain.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted.

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IN THE

Supreme Court of the United States

FREEEATS.COM, INC.,

Petitioner,

v.

NORTH DAKOTA

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH DAKOTA

REPLY BRIEF OF PETITIONER

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The Supreme Court of North Dakota misinterpreted the saving clause of the Telephone Consumer Protection Act ("TCPA") as giving the States authority to regulate prerecorded interstate political polling calls. Its decision conflicts with multiple decisions of this Court and ignores the text, legislative history, and structure of the TCPA. The issue presented is of great significance, not only for its chilling effect on core political speech protected by the First Amendment, but also for its effects in other areas in which the States have adopted laws that are inconsistent with the rule implementing the TCPA adopted by the Federal Communications Commission ("FCC"). The Court should grant review to resolve this important and recurring question.

I. This Case Presents A Question Of Great Importance For Protection Of Political Speech.

1. Resolution of the issue presented by the North Dakota statute has vital significance for the protection of political speech, which is entitled to the highest degree of protection under the First Amendment. The question of the proper interpretation of the TCPA saving clause also has major consequences for many other cases in which various States have adopted laws that differ significantly from the FCC rule implementing the TCPA.

As each successive election cycle shows, prerecorded political calls have become an important tool of political advocacy. The Supreme Court of North Dakota has erroneously decided that a State law may overcome a rule adopted by the FCC which determined that prerecorded, interstate political calls should not be prohibited. This case presents a straightforward vehicle for resolution of this important issue, before that decision has further adverse effects on political pollsters, political candidates, and voters.

2. In adopting Section 227(b)(2)(B)(i) of the TCPA and directing the FCC to conduct a rulemaking to consider

the proper balancing of the First Amendment and privacy interests involved in non-commercial calls, Congress recognized the importance of the free speech considerations involved in this case. As *amici* The Center for Competitive Politics *et al.* demonstrate (Brief at 6-9), the political communications at issue in this case are at the core of the First Amendment. North Dakota's statutory ban on prerecorded interstate political calls has chilled the ability of political pollsters and candidates to communicate effectively with the residents of that State. It thereby deprives the residents of that State from access to an important source of information to help them exercise their right to vote.

The importance of review of this issue at this time is underlined by recent developments. As noted in the Petition, other States have adopted and are enforcing similar prohibitions on prerecorded, interstate political calls. (Pet. at 24 & n.8). On August 22, 2006, the Attorney General of Indiana sent a letter to the chairmen of the State's Democratic and Republican parties warning them against making automated political phone calls to Indiana voters during the upcoming election campaigns. This year alone, Indiana reportedly has fined six companies, all from out of state, for initiating prerecorded calls. The Chairman of the Indiana Democratic Party has stated that his office had planned to make prerecorded political polling calls beginning in October, but was reviewing the situation in light of the Attorney General's contact.[1] This development demonstrates that State prohibition of prerecorded political calls is a broader problem, not limited to North Dakota, and is currently having chilling effects on the speech of political pollsters, candidates, and voters.

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[1] *Indianapolis Star, "Political Parties Warned about Illegal Calls,"* Aug. 29, 2006, available at www.indystar.com/apps/pbcs.dll/article?AID=20060829/NEWS02/608290470 (visited Sept. 6, 2006). The State law involved is Indiana Code § 24-5-14-5.

3. The problems presented by the North Dakota Supreme Court's interpretation of the TCPA saving clause are not limited to political calls. Many States have enacted limits on interstate telemarketing calls that are more restrictive than those adopted by the FCC in its TCPA implementing rule. (Pet. at 24-26). The Supreme Court of Utah has erroneously interpreted the TCPA saving clause to sustain such a State law. *Utah Div. of Consumer Protection v. Flagship Capital*, 125 P.3d 894 (Utah 2005).

As *amicus* Chamber of Commerce of the United States of America demonstrates (Brief at 4-6), businesses that make interstate telemarketing communications are caught in the middle between the federal rules and the proliferating, inconsistent State requirements. They are faced with the costs and delays of compliance and the threat of litigation and penalties for any misunderstanding of these overlapping requirements. As a result, types of speech that Congress and the FCC found permissible are being deterred, and both free speech and economic interests are being adversely affected.

4. Respondent contends that review is premature, because the decision below does not conflict with the decision of any State court of last resort or any federal court of appeals. (Opp. at 6, 11). However, the decision below squarely conflicts with the governing federal law – the FCC rule that exempted from the TCPA prohibition prerecorded, interstate political calls. This Court has granted certiorari to review the effects of State laws on interests protected by the Commerce Clause, even when the legal dispute involved only an enactment by a single State and there was no conflict among the highest courts of the States or the federal circuits. *E.g., Hillside Dairy Inc. v. Lyons*, 539 U.S. 59 (2003) (Commerce Clause challenge to California milk pricing statute); *see also Camps Newfound/Owatonna v. Town of Harrison*, 520 U.S. 564 (1997) (Commerce Clause challenge to unique Maine tax

exemption statute); *Trinova Corp. v. Michigan Dept. of Treasury*, 498 U.S. 358 (1991) (Commerce Clause challenge to the first State law to impose a value added tax on business activity).

Moreover, the question involved here has actual and immediate significance in the other States that have enacted laws that are inconsistent with the FCC's rule.

5. Respondent also asserts that the Court should decline review at this time and await the outcome of possible future litigation on the issue that might arise from a request for a declaratory ruling that Petitioner filed with the FCC. (Opp. at 19). The suggested approach is entirely speculative, and does not provide an appropriate means of resolving this important question. The hypothetical litigation may never occur. The FCC's decision whether to grant a request for a declaratory ruling is a discretionary act; Petitioner's request for a declaratory ruling has been pending for two years without action. (*See* Pet. 29 n.19). Further, Respondent has not committed to litigating the matter should the FCC rule against it. Indeed, California chose not to appeal the decision against application of its fax statute to interstate calls. *Chamber of Commerce v. Lockyer*, 2006 WL 462482 (E.D. Cal. 2006). (Opp. at 6). If other States follow the same approach, the question of the proper interpretation of the TCPA saving clause could evade review for a substantial period of time.

If review of this issue is deferred, the adverse effects of the decision below and of *Flagship Capital* will continue to spread. "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality opinion). Further, nothing would be gained by delaying. The FCC's position is already known: It has exempted prerecorded, interstate political calls from the TCPA prohibition that otherwise would apply.

State laws that differ from its implementing rule are almost certainly preempted, and the case for preemption is at its strongest where, as here, the State law prohibits what the FCC rule permits. Should there be any doubt on this score, the Court might consider asking the Solicitor General to state the views of the United States.

II. The Court Below Erroneously Decided An Important Question In Conflict With Prior Decisions Of This Court.

1. Respondent contends that North Dakota Century Code § 51-28-02 is an exercise of its "traditional police powers" to protect consumer privacy and that a presumption against preemption should be applied. (Opp. at 1, 2, 9, 18). It cites no prior case holding that the States have power to regulate the initiating of interstate calls. This argument is without merit.

Since 1934, Congress has vested the FCC with the authority to regulate the initiation of interstate calls and has denied this power to the States. 47 U.S.C. §§ 152 (a)-(b). Against this background of preemption, the State has no "traditional police power" to exercise in the regulation of interstate telephone calls. *See United States v. Locke*, 529 U.S. 89, 108 (2000) Indeed, the very scope of Respondent's "traditional police power" argument demonstrates why review should be granted. The logic of its argument extends well beyond this case and would drastically recast the preemption doctrine.

2. There is no basis, either in the Communications Act or the TCPA, for Respondent's claim that the States are empowered "to exercise concurrent jurisdiction" over the initiation of interstate telephone calls. (Opp. at 10).

If there were no TCPA, the States would not have jurisdiction to prohibit interstate calls, and the North Dakota statute would be unconstitutional. The TCPA was enacted to establish federal rules for certain types of interstate calls and to set a federal minimum standard for

intrastate calls. Through the TCPA saving clause, Congress preserved the States' authority to regulate intrastate calls, provided that they complied with the minimum federal standards. It would be a major distortion of the TCPA to interpret the saving clause as a *grant of new authority* to the States to do what they previously could not and to provide concurrent jurisdiction over the initiation of *interstate* calls.

Sections 152(a) and (b) of the Communications Act establish a standing allocation of authority under which the FCC generally has authority to regulate interstate calls and the States may, with some exceptions, regulate intrastate calls. (Pet. at 13-14). In adopting the TCPA, Congress clearly understood that the States had no authority under the Communications Act to regulate interstate telemarketing calls. Section 2(7) of the TCPA, 105 Stat. 2394, specifically provides that "Federal law is needed to control residential telemarketing practices" because "telemarketers can evade their prohibitions [State laws] through interstate operations." The legislative history confirms that federal legislation was necessary because the States lacked this power.[2]

The substantive provisions of the TCPA do not provide the States with authority to regulate interstate telemarketing calls. North Dakota would find that power in the saving clause, 47 U.S.C. § 227 (e)(1). However, the Court has repeatedly admonished that it will not "'give broad effect to saving clauses where doing so would upset the careful regulatory scheme established by federal law.'" *Geier v. American Honda Motor Co.*, 529 U.S. 861, 870 (2000), quoting *Locke*, 529 U.S. at 106. Simply put,

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[2] The Senate Report stated that prior State telemarketing laws "have had limited effect, however, because States do not have jurisdiction over interstate calls. Many States have expressed a desire for Federal legislation to regulate interstate telemarketing calls to supplement their restrictions on intrastate calls." S. Rep. No. 102-178 at 3 (1991), *reprinted in* 1991 U.S.C.C.A.N. 1968, 1970.

there was no prior State power over interstate calls to be saved.

3. Respondent asserts that through the saving clause, Congress preserved for the States the limited power to establish requirements and regulations on intrastate calls and the broader power to prohibit both intra- and inter-state calls. (Opp. at 3). This claim is groundless.

Congress may authorize the States to engage in regulatory activities that otherwise would be preempted due to a conflict with the exercise of federal power under the Commerce Clause. However, the Court has repeatedly stated that an exemption from the limitations imposed by the Commerce Clause must be unmistakably clear. *See, e.g., Hillside Dairy, Inc.* 539 U.S. at 66 (2003); *Wyoming v. Oklahoma*, 502 U.S. 437, 458 (1992).

The saving clause does not satisfy this test. The text of Section 227(e)(1) does not refer to interstate telephone calls. Respondent argues that the term "interstate" should be introduced into the saving clause by inference, because Congress did utilize the word "intrastate." On its face, this argument fails to provide the kind of unambiguous showing required by *Hillside Dairy* and its predecessors to justify the conclusion that Congress intended conflicting State law to override the federal statute.[3]

4. As demonstrated in the Petition and the supporting *amicus* briefs, the language of Section 227(e)(1) is awkward and ungrammatical. No unambiguous, grammati-

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[3] The legislative history contradicts Respondent's argument. During final passage of the TCPA, Senate Committee Chairman Hollings expressly noted that "Section 227(e)(1) clarifies that the bill is not intended to preempt State authority regarding *intrastate* communications except with respect to the technical standards under section 227(d) and subject to section 227(e)(2). Pursuant to the general preemptive effect of the Communications Act of 1934, State regulation of *interstate* communications, *including interstate communications initiated for telemarketing purposes*, is preempted." 137 Cong. Rec. S18781, S18784 (daily ed. Nov. 27, 1991) (emphasis added).

cally consistent interpretation of the statutory text is possible. Under these circumstances, interpretation is properly guided by the structure and context of the overall statute. The structure of the Communications Act, as amended by the TCPA, refutes Respondent's claim that Congress intended to allow a conflicting State law to displace the FCC rule. The TCPA did not amend Section 152(a) of the Communications Act, which authorizes the FCC to regulate interstate calls. The saving clause is incorporated into Section 152(b), which does not grant the States authority over interstate calls, but rather limits the FCC's authority to regulate intrastate calls.

Respondent's argument, that it may only restrict intrastate calls but may prohibit intra- or interstate calls, fails for several reasons besides those noted above. First, there is no line of demarcation between the terms "requirements or regulations on" and "which prohibits." It is highly unlikely that Congress chose such an indeterminate basis for allocating regulatory authority between the federal government and the States. *See United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 812 (2000) (the "distinction between laws burdening and laws banning speech is but a matter of degree").[4]

Respondent's proposed interpretation depends entirely on the illusory proposition that "requirements and regulations" and "prohibitions" can be divided into two distinct compartments. Petitioner's interpretation, by contrast, recognizes that in reality there is a substantial degree of overlap between the two terms. Under this interpretation the term "or which prohibits" serves the logical function of providing explicitly that the pre-existing

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[4] Under Respondent's proposed approach, Section 51-28-02 itself may not constitute a "prohibition" because it permits pre-recorded calls under certain circumstances. This underlines that Respondent's interpretation is both incoherent and unworkable, because it provides no basis for determining when a State would or would not have authority.

State power over intrastate calls, which was preserved by the saving clause, may extend to include an absolute "prohibition" of prerecorded intrastate calls.[5]

Second, the State's construction ignores the interpretation of the TCPA by the FCC, which determined that interstate political calls should not be prohibited.

5. Other than the decision of the Utah Supreme Court in *Flagship Capital*, none of the cases on which Respondent relies holds that the TCPA saving clause grants the States authority to regulate interstate calls. (Opp. at 12-16). These cases generally address the question whether Congress intended to give State courts or federal courts subject matter jurisdiction over the consumer damages action created by the TCPA.[6] To the extent these opinions note the saving clause in passing, those discussions are dicta.

Respondent also relies upon *Van Bergen v. Minnesota*, 59 F.3d 1541 (8th Cir. 1995), but its own argument demonstrates that the case addressed State regulation of intrastate, not interstate, calls. The Opposition notes that

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[5] This answers Respondent's claim that the phrase "or which prohibits" must be interpreted as applying to interstate calls in order to prevent it from becoming surplusage. (Opp. at 7).

Respondent also argues that Section 51-28-02 is not preempted because it is possible for a person to comply with both the federal and State laws simultaneously, by not engaging in the activity that is permitted by the FCC rule. (Opp. at 7-8). The statute is nonetheless unconstitutional because it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Geier*, 529 U.S. at 873.

[6] *Erienet, Inc. v. Velocity Net, Inc.*, 156 F.3d 513 (3rd Cir. 1998); *Nicholson v. Hooters of Augusta, Inc.*, 136 F.3d 1287 (11th Cir. 1998); *Chair King, Inc. v. Houston Cellular Corp.*, 131 F.3d 507 (5th Cir. 1997); *Int'l Science & Technology Institute v. Inacom Comm., Inc.*, 106 F.3d 1146 (4th Cir. 1997). The remaining case, *Chair King, Inc. v. GTE Mobilnet of Houston, Inc.*, 184 S.W.2d 707 (Tex. 2006), considered the date on which Texas had granted its consent to such a cause of action.

the lower court in *Van Bergen* found that there was no evidence that the Minnesota plaintiff intended to make prerecorded calls anywhere other than in Minnesota and thus concluded that he lacked standing to address issues that other parties might raise. (Opp. at 13 n.7). In any event, the Supreme Court of North Dakota did not rely on *Van Bergen* to support its conflict preemption analysis.

6. In addition to adopting substantive federal rules to regulate interstate telemarketing calls, the TCPA carved out a significant role for the States. Besides preserving the States' ability to adopt laws which impose "requirements or regulations on" or "which prohibits" intrastate calls, the law authorized the States to participate in its enforcement. In particular, the States may seek injunctive relief in federal court for violations of the TCPA, 47 U.S.C. § 227 (f)(1), and have discretion to determine whether their courts will exercise jurisdiction over the private damages action that Congress authorized. 47 U.S.C. § 227 (b)(3).

Congress did not, however, grant the States concurrent jurisdiction with the FCC to *define* what types of prerecorded, interstate political calls should be lawful.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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Nos. 06-127

IN THE

Supreme Court of the United States

FREEEATS.COM, INC.,

Petitioner,

v.

NORTH DAKOTA,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of North Dakota

BRIEF OF *AMICI CURIAE* THE CENTER FOR COMPETITIVE POLITICS, THE CENTER FOR INDIVIDUAL FREEEDOM, AND THE CENTER FOR THE RULE OF LAW IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

The Center for Competitive Politics is a non-profit 501(c)(3) organization founded in August, 2005, by Bradley Smith, former Chairman of the Federal Election Commission, and Stephen Hoersting, a campaign finance attorney and former General Counsel to the National Republican Senatorial Committee. CCP's mission, through legal briefs, academically rigorous studies, historical and constitutional analysis, and media communication, is to educate the public on the actual effects of money in politics, and the results of a more free and competitive electoral process. CCP is interested in this case because it involves a restriction on political communications that will hinder political competition and information-flow and because, in the context of existing restrictions on various forms of election-related communications, it raises the costs, and thus decreases the usability, of one means of communication that provides a safety valve relative to the more severe restrictions on broadcast communications.

The Center for Individual Freedom is a nonpartisan, non-profit organization with the mission to protect and defend individual freedoms and individual rights guaranteed by the U.S. Constitution, including, but not limited to, free speech rights, property rights, privacy rights, freedom of association, and religious freedoms. Of particular importance to the Center in this case is the constitutional freedom of political speech, which is burdened by North Dakota's restrictions on political speech through interstate telecommunications.

The Center for the Rule of Law, chaired by the Honorable Ronald A. Cass, is a non-profit enterprise dedicated to educating the public about issues affecting the rule of law. The Center's legal scholars and policy experts analyze the rule of

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[1] This brief is filed with the written consent of all parties. No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *Amici* or their counsel, make a monetary contribution to the preparation or submission of this brief.

law dimensions in matters ranging across regulation, litigation, international trade rules, competition law, property rights, intellectual property, securities and corporation law, administrative and constitutional law, and other governmental decisions. This case is of interest to the Center in that it involves an attempt to break down a clear rule of law separating the responsibility for intra- and interstate telecommunications, and will result in the proliferation of inconsistent rules affecting political speech that undermine clarity and consistency in the rule of law.

STATEMENT

The North Dakota statute at issue in this case, N.D.C.C. § 51-28-02, restricts, *inter alia*, the use of automatic dialer recorded message players (ADRMPs) to make interstate calls gathering political polling information and delivering political messages. In particular, the statute provides that

> A caller may not use or connect to a telephone line an automatic dialing-announcing device unless the subscriber has knowingly requested, consented to, permitted, or authorized receipt of the message or the message is immediately preceded by a live operator who obtains the subscriber's consent before the message is delivered. This section and section 51-28-05 do not apply to a message from a public safety agency notifying a person of an emergency; a message from a school district to a student, a parent, or an employee; a message to a subscriber with whom the caller has a current business relationship; or a message advising an employee of a work schedule.

The court below, Pet. App. 15a-16a, applied a presumption against preemption in an area covered by the cross section of two significant federal interests – interstate communications and the First Amendment's guarantee of freedom of speech.

The court also incorrectly found that the "plain meaning" of the savings clause in the Telephone Consumer Protection

Act ("TCPA") spared from preemption prohibitions on interstate calls using ADRMPs. The savings clause of the TCPA provides:

> Except for the standards prescribed under subsection (d) of this section and subject to paragraph (2) of this subsection, nothing in this section or in the regulations prescribed under this section shall preempt any State law that imposes more restrictive *intrastate* requirements or regulations on, or which prohibits--
>
> **(A)** the use of telephone facsimile machines or other electronic devices to send unsolicited advertisements;
>
> **(B)** the use of automatic telephone dialing systems;
>
> **(C)** the use of artificial or prerecorded voice messages; or
>
> **(D)** the making of telephone solicitations.

47 U.S.C. § 227(e)(1) (emphasis added).

The court below found that the limiting word "intrastate" in the savings clause only applied to "requirements or regulations on" the use of ADRMPs, but did not limit state "prohibit[ions]" on the use of such communications tools in *interstate* telecommunications. Pet. App. 10a-12a. The court thus concluded that the clause saved from preemption state prohibitions on both intra- and interstate use of such tools, even though the savings clause did *not* extend to *inter*state "requirements or regulations" given the placement of the word "intrastate" in the sentence.

SUMMARY OF ARGUMENT

1. The Petition in this case presents an important issue regarding both federal control over interstate communications, and state interference with communications that are integral parts of the political process. The consequences of allowing such state interference with the political communications at issue here are that an efficient and inexpensive means

of interstate political speech will be severely restricted and made more costly. Such restrictions undermine competitive electoral politics just as the country is gearing up for a major national election, and have a negative synergy with various federal restrictions on spending for mass political communication, limiting a non-broadcast-media safety valve for political speech at a time when the funding of broadcast political communication has become more heavily regulated. This case thus involves important national issues that should be resolved by this Court given the context and the timing of those issues as applied to such important political speech.

2. The court below made three critical errors in concluding that the North Dakota statute regulating, *inter alia*, political speech was not preempted. First, it incorrectly applied a presumption against preemption of state laws directed at interstate telecommunications, when the longstanding structure of the Federal Communications Act ("FCA"), and the text and history of the TCPA, undermine such a presumption and in fact suggest that an opposite presumption is more appropriate.

Second, the court below incorrectly concluded that the North Dakota statute was not preempted even assuming, *arguendo*, its erroneous construction of the TCPA's savings clause. Regardless whether that savings clause applies to interstate prohibitions on calls using ADRMPs, as distinct from *intra*state regulations on the use of such tools, it still would save such state law only from preemption by the TCPA itself, and not from any background preemptive effect of the FCA as a whole. Furthermore, given that the statute being challenged is in fact a requirement or regulation on, and not a prohibition of, the use of automatic dialers and recorded messages, it would not qualify for protection under the savings clause in any event. The court's treatment of the statute as a prohibition completely vitiates any meaningful distinction between prohibitions and restrictions that the savings clause might be thought to create.

Third, the court below incorrectly held that the language of the savings clause was plain in preserving *interstate* prohibitions. In fact, the savings clause is not "plain" at all, but rather is quite ungrammatical under any construction. Because there is an equally reasonable, though similarly ungrammatical, construction under which the modifier "intrastate" applies equally to requirements or regulations *on* the use of ADRMPs and to requirements or regulations *prohibiting* the use of ADRMPs, the savings clause is ambiguous. The choice of construction of that ambiguous clause should have been made by relying on the background provisions, policies, and history of the FCA and the TCPA. Such an approach would have yielded an opposite result in this case, with the narrower version of the savings clause, limited to *intra*state matters only, being the proper selection and the state statute being preempted. That narrow construction best comports with the long-standing background rule of the FCA and with Congress' fundamental understanding of the scope of state authority when it enacted the TCPA, and avoids unneeded conflict with the First Amendment.

ARGUMENT

I. The Petition Presents an Important Question Affecting the Freedom to Engage in Interstate Political Communications.

As the Petition correctly notes, the question presented in this case raises important issues under the Supremacy Clause affecting an area of interstate commerce – interstate telecommunications – that has long been the object of virtually exclusive federal control. Pet. 13-15, 17-19. Notwithstanding the history of exclusive federal control in this area, as recognized by Congress itself as the very predicate for adopting the TCPA, *see infra* at 10-11, States have increasingly sought to extend their authority into this interstate arena. Pet. 24-26.

In addition to the basic and substantial importance this case has under the Supremacy Clause and for interstate telecommunications as a subset of interstate commerce, this case also is important in that it arises in the context of state regulation of core political speech. While the question presented in the Petition is important for *all* non-commercial calling, the restriction on political speech in this case is especially pressing and significant and hence this case is a timely and important vehicle for addressing that question.

The First Amendment concerns underlying this case are highlighted by Congress' and the FCC's own rationales for creating an exception to the TCPA for non-commercial speech. Congress itself recognized the potential First Amendment problem when it authorized the FCC to create an exemption consistent with this Court's commercial speech jurisprudence. *See* PUB. L. 102-243, § 2(9), 105 Stat. 2394 (1991) ("Individuals' privacy rights, public safety interests, and commercial freedoms of speech and trade must be balanced in a way that protects the privacy of individuals and permits legitimate telemarketing practices"); *id.* § 2(13) ("the Federal Communications Commission should have the flexibility to design different rules for those types of automated or prerecorded calls that it finds are not considered a nuisance or invasion of privacy, or for noncommercial calls, consistent with the free speech protections embodied in the First Amendment of the Constitution"). The FCC likewise confirmed the potential First Amendment problem when it found that the primary target of the TCPA was commercial speech, which has a relatively lower value on the constitutional spectrum than non-commercial speech and was the primary cause of the invasion of privacy that justified the TCPA in the first place. *See* Report and Order, *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act Of 1991*, 7 F.C.C.R. 8752, 8773 (Oct. 16, 1992) ("the TCPA seeks primarily to protect subscribers from unrestricted commercial telemarketing activities"); *id.* ("The legislative

history of the TCPA contrasts calls made by tax-exempt non-profit organizations with commercial calls and indicates that commercial calls have by far produced the greatest number of complaints"). Indeed, in deciding to exempt non-commercial speech from most of the restrictions contained in the TCPA, the FCC specifically found that non-commercial communications did *not* pose the same harms as commercial solicitations, thus undermining any possibility of a compelling or even a substantial interest in restricting such non-commercial speech. *See id.* at 8774 ("no evidence has been presented in this proceeding to show that non-commercial calls represent as serious a concern for telephone subscribers as unsolicited commercial calls").

Various cases that have addressed First Amendment issues relating to the TCPA likewise have relied upon the more lenient standards for commercial speech in finding the TCPA did not violate the First Amendment. *See Destination Ventures, Ltd.* v. *FCC*, 46 F.3d 54, 55 (CA9 1995) (analyzing and upholding fax provisions of TCPA under commercial speech cases); *Minnesota ex rel. Hatch* v. *Sunbelt Communications and Marketing*, 282 F. Supp.2d 976, 981, 983 (D. Minn. 2002) (TCPA provisions on faxes upheld under commercial speech standards, and rejecting a claim of underinclusiveness as to political messages by finding that "political messages or solicitations for campaign contributions may be deemed to be "political speech" as opposed to "commercial speech," rendering *Central Hudson* inapplicable"); *Kenro, Inc.* v. *Fax Daily, Inc.*, 962 F. Supp. 1162, 1167 (S.D. Ind. 1997) (upholding TCPA fax provisions by applying commercial speech standards). The strong implication of those cases – particularly when coupled with the FCC's findings regarding less harm from non-commercial speech – is that similar restrictions on *political* speech would be hard-pressed to pass constitutional muster. *But see Moser* v. *FCC*, 46 F.3d 970, 973 (CA9) (erroneously analyzing the TCPA as a content-neutral time-place-manner restriction, rather than as a commercial

speech restriction, despite the FCC's adoption of an exemption for non-commercial speech as provided in the statute), *cert. denied*, 515 U.S. 1161 (1995).

The speech at issue in this case, and similar speech also restricted by the North Dakota statute, lies at the core of the First Amendment and receives its greatest protection. That underlying constitutional problem provides a reason to read preemption under the TCPA broadly and to read the savings clause narrowly as encompassing only intrastate prohibitions, in order to narrow the range of possible conflict with the First Amendment, and thereby avoid, or at least put off, the need to address a constitutional issue.

The question presented by the Petition takes on added urgency in light of the impending national elections. Given the increasing restrictions placed on the funding of electioneering communications through broadcast media channels, political speech related to elections using the alternative channels of, *inter alia*, telephone communications takes on added importance. And given that there are also a variety of restrictions on funding even non-broadcast efforts to get out the vote or use telephone banks for political communications, *see* 2 U.S.C. § 441i(b)(1) (restrictions related to state and local "Federal election activity"), *id.* § 431(20)(A)(iii) (defining "public communication" as part of "Federal election activity), *id.* at 431(22) (defining public communication as including communications by a "telephone bank to the general public"), statutes such as the one being challenged here can significantly restrict or burden this non-broadcast alternative avenue of political communication. Such alternative forms of political communications have stepped in to fill the gap from the greater restrictions on broadcast communications precisely because technology has advanced to make such alternatives cost effective within the funding constraints imposed by campaign finance laws. Indeed, Congress has recognized that automated and pre-recorded telecommunications have expanded precisely because such automation has lowered their

cost (relative to having large numbers of persons manning a phone bank). *See* S. REP. 102-178, 102nd Cong., 1st Sess., Oct. 8, 1991, *reprinted in* 1991 U.S.C.C.A.N. 1968, 1969 ("the advance of technology * * * makes automated phone calls more cost-effective").

With laws such as North Dakota's, however, States will raise the costs of communicating with their populations and effectively wall off their citizens from an efficient and effective means of communications. If this Court allowed such a cost-effective alternative avenue of communication to be shut down, or significantly impeded by the requirement of a live person initiating each and every call, that would undermine one of its justifications for upholding restrictions on broad-based communications in the first place, and hinder the political process in a manner contrary to the First Amendment.

The negative synergies that arise from allowing States to undermine the FCC's exemption for political telecommunications thus reach well beyond issues of consumer privacy, federal supremacy, and interstate commerce, and encroach upon a vital constitutional area on the eve of a major national election. Timely consideration of this case, and correction of the error below, thus is of pressing national importance.

II. The Savings Clause in the TCPA Should Be Read Narrowly so as To Avoid Trenching on Important Areas of Free Speech and Interstate Commerce.

In order to avoid an unnecessary clash with the First Amendment (and possibly with other constitutional constraints such as the Dormant Commerce Clause), this Court should read the TCPA's savings clause narrowly as limited to preserving only the States' traditional authority over intrastate telecommunications, and not extending their authority into the interstate realm as well. Fortunately, there are ample grounds for such a limited reading that would preserve the long-standing dichotomy between federal and state jurisdiction over telecommunications.

A. The Court Below Applied an Incorrect Presumption Regarding Whether the North Dakota Statute Was Preempted.

As noted in the Petition, the court below incorrectly applied a presumption *against* preemption, notwithstanding the pervasive and largely exclusive federal regulation of interstate telecommunications. *See* Pet. 17-19; Pet. App. 15a-16a. But against the background division of inter- and intrastate jurisdiction established by 47 U.S.C. § 152(a) & (b), that presumption was error and, if anything, should have been exactly reversed. Indeed, the error of the presumption applied below, and the appropriateness of a presumption in favor of preemption of state encroachments on interstate telecommunications, is confirmed by the text and history of the TCPA itself.

When it enacted the TCPA, Congress specifically found, as part of the law, that there was a need for federal legislation because "[o]ver half the States now have statutes restricting various uses of the telephone for marketing, but telemarketers can evade their prohibitions through interstate operation." PUB. L. 102-243, § 2(7). That express statutory recognition of the state of the law prior to the TCPA is compelling proof of the limits Congress understood to exist on state regulation of interstate telecommunications. Having been incorporated into a statute passed by Congress, such congressional understanding of the jurisdictional boundaries it has created in the telecommunications area is entitled to considerable respect from this Court when it comes to assessing whether the TCPA somehow abolished or modified such existing boundaries.

The legislative history of the TCPA similarly confirms Congress' understanding that the States could not reach out to control interstate telecommunications. *See* S. REP. 102-178, 1991 U.S.C.C.A.N. at 1970 (recognizing over 40 state laws on ADRMPs and noting their limited effect "because States do not have jurisdiction over interstate calls"); *id.* (noting that States desired federal regulation of "interstate calls to supplement their restrictions on intrastate calls"); *id.* at 1973

("Federal action is necessary because States do not have the jurisdiction to protect their citizens against those who use these machines to place interstate telephone calls.").

Given the fundamental predicate of preemption as the basis for enacting the TCPA in the first place, the court below erred in assuming and applying a contrary presumption against preemption in this case.

B. The Court Below Incorrectly Ignored the Pre-Existing Preemptive Effect of the FCA, which Applies Regardless of Any Additional Preemption, or Lack thereof, Due to the TCPA.

Even assuming, *arguendo*, the North Dakota Supreme Court's broad construction of the TCPA saving clause as applying to interstate prohibitions on the use of ADRMPs, the decision below still erred in finding that the state statute was not preempted. Regardless whether the TCPA itself fails to preempt the law in question, the statute would be preempted even without the TCPA, and nothing in the TCPA's savings clause changes that pre-existing result.

Under the FCA, interstate telecommunications is the province of the FCC, not the States. 47 U.S.C. § 152(a). Given the history of extensive federal regulation in this area and the text and history of the TCPA recognizing the lack of state jurisdiction – not to mention the operation of the Dormant Commerce Clause on state regulation of the instrumentalities and functioning of interstate communications – any state intrusion into interstate telecommunications should have been met with a high degree of skepticism, not a presumption of permissibility and a narrow focus on a limited savings clause. The starting point of the analysis thus should have been the preeminent and presumptively exclusive federal power over interstate commerce, not a misplaced reliance on the supposed breadth of the State's police power.

With the proper background regarding preemption firmly in mind, the question is whether the passage of the TCPA

somehow undermined that existing preemption, even assuming, *arguendo*, that it did not provide a *new* ground for preemption. Turning to the TCPA, that act *required* a variety of restrictions on the use of ADRMPs, but in no way suggested that the FCC previously lacked the *power* to regulate the use of such devices in interstate telecommunications. Indeed, the only aspect of the FCC's jurisdiction that was expressly addressed was the *addition* of FCC authority over certain intrastate communications – authority that it previously lacked due to 47 U.S.C. § 152(b), which was expressly amended to address the expansion of FCC authority. *See* Pet. 2-3, 17-18. But there was no concomitant amendment restricting the FCC's existing authority over interstate communications under § 152(a), or expanding state jurisdiction into that area, suggesting that such FCC authority already existed and continued with the same preemptive force it had in the first place.

Similarly, the savings clause itself constrained only the effect of the TCPA itself, with no suggestion that it was likewise constraining the force of § 152(a). In particular, the clause states that "nothing in *this section*," or the regulations thereunder, shall preempt state law in the narrow circumstances it defined. 47 U.S.C. § 227(e)(1). The savings clause does *not* address whether such state law is already or otherwise preempted by *other* aspects of the statutory scheme, for example, the jurisdictional boundaries established by § 152.[2]

Thus, even assuming the TCPA does not preempt the North Dakota law by its own operation, there is no reason to

[2] The very existence of that clause suggests that the TCPA had some *additional* preemptive force relative to the background preemption under the FCA. That implication follows from the very nature of a savings clause in the first place, which is to save something from an effect that would otherwise occur. *See* BLACK'S LAW DICTIONARY 1344 (7th ed. 1999) ("savings clause. 1. A statutory provision exemptiong from coverage something that would otherwise be included."). Such additional preemption would be in connection with the FCC's new authority over certain *intra*state communications, which the savings clause counters to some degree.

suspect that it in any way undermined the preemptive force that already existed by virtue of § 152(a). The decision below thus erred by changing a limited savings clause applicable only to the TCPA itself into a broader savings clause that carved out an exception to the FCA in general.

Furthermore, even assuming the construction of the savings clause given by the court below, it still would not save the statute at issue here, which is plainly a "requirement or regulation" on the use of ADRMPs rather than a prohibition. The TCPA's savings clause, according to the court below, saves any state law "which prohibits -- * * * (B) the use of automatic telephone dialing systems; [or] (C) the use of artificial or prerecorded voice messages." 47 U.S.C. § 227(e)(1)(B) & (C). The court below apparently concedes that an *inter*state "requirement or regulation" is preempted by the TCPA insofar as such state action falls outside the specifically narrowed terms of the savings clause. Such preemption exists by force of the TCPA itself, quite apart from the effect of the FCA in general.

The court below drew a distinction between requirements and regulations on the one hand, and a prohibition on the other, reasoning that a prohibition is less intrusive in that it has a single answer – "no" – to any conceivable question concerning the use of automatic dialers or recorded messages going into the State, and hence would not be confusing or burdensome. Pet. App. 11a-12a. But N.D.C.C. § 51-28-02 certainly does not "prohibit" the "use of" automatic dialing systems or prerecorded messages, and indeed expressly allows their use under a variety of circumstances. For example, the statute allows the use of such communications tools where there has been consent or permission for such use, where the messages are for public safety purposes, for school- and work-related messages, and where the caller has a current business relationship with the person being called. Rather than a universal "no" to the use of ADRMPs, North Dakota establishes a variety of conditions and requirements on their

use. While uses not meeting such requirements are indeed forbidden, that would be true regarding *any* requirement or regulation, which would restrict non-compliant uses.

Such conditional limits and exceptions regarding the use of ADRMPs are *not* an outright prohibition on the use of such communications tools and thus do not qualify for protection under the savings clause even assuming the court's broader construction of that clause. That the court below nonetheless applied the savings clause to the statute in this case simply shows that it conflated requirements and regulations with a prohibition, and gutted the very distinction upon which its construction relied. That conflation of terms entirely vitiates the effect of the word "intrastate" even as a limit on "requirements and regulations." If every regulation can be recast as a prohibition, then *no* state law affecting the interstate use of ADRMPs would be preempted and the actual language of the savings clause would make no sense at all. Such *de facto* mutilation of the TCPA's savings clause is reason enough for this Court to grant certiorari, even if it agreed with the North Dakota Supreme Court's basic construction of that clause.

C. The Court Below Incorrectly Concluded that the Ambiguous Savings Clause in the TCPA Plainly Protected the Statute Being Challenged.

As noted in the Petition, the "plain meaning" analysis of the court below depended on a construction of the savings clause that was ungrammatical in that it equated two clauses that start with the materially different words "that" and "which." Such grammatical difficulty is a function of the poorly drafted savings clause itself, which seems to lack *any* wholly grammatical construction at all, and hence can hardly be said to have a "plain" meaning. Indeed, the grammatical problem identified in the Petition makes it far from plain that the phrase "or which prohibits" defines a different category of state law separate from "intrastate requirements or regulations" rather than a potential *subset* of such requirements or

regulations. Given that there is an equally plausible construction of the clause that would *not* save the statute being challenged, the clause presents a classic case of ambiguity.

Under the North Dakota Supreme Court's reading, the two phrases supposedly defining the separate categories of "law" to which the savings clause applies make an ungrammatical switch between the restrictive word "that" and the non-restrictive word "which." Charting the sentence as the court below would read it demonstrates that the *object* of the qualifying phrases would be "any State law." *See* Chart 1, below. The chart also shows, however, that the qualifying phrases switch between starting with "that" and "which," thus undermining the supposedly parallel construction claimed by the court, and raising doubts that the word "intrastate" applies exclusively to the phrase addressing "requirements and regulations." A wholly grammatical sentence having the meaning ascribed below would start both phrases with the word "that" to demonstrate parallel and separate phrases.

Chart 1: Construction by Court Below

<table>
<tr>
<td rowspan="3">[N]othing in this section or in the regulations prescribed under this section shall preempt <u>any State law</u></td>
<td><u>that</u> imposes more restrictive <u>intrastate</u> requirements or regulations on</td>
<td rowspan="3">* * *
(B) the use of automatic telephone dialing systems; [or]
(C) the use of artificial or prerecorded voice messages
* * *</td>
</tr>
<tr>
<td>, or</td>
</tr>
<tr>
<td><u>which</u> prohibits--</td>
</tr>
</table>

An alternate reading, though not without grammatical problems of its own, is that the underlying *object* of the relevant qualifiers is "interstate restrictions and regulations,"

which is then modified by the disjunctive and parallel descriptive phrases "on * * * the use of" automatic dialers or prerecorded messages and "which prohibits * * * the use of" automatic dialers or prerecorded messages. Charting that alternate reading, *see* Chart 2, below, shows the elimination of the that/which problem. The word "that" begins a compound restrictive phrase that encompasses *all* of the following language, and the word "which" begins only a non-restrictive sub-phrase within the larger compound restrictive phrase. The chart, however, demonstrates a different, though common, grammatical problem, which is the failure of number agreement between the non-restrictive phrase "which prohibit*s*" and the internal object of that phrase "more restrictive interstate requirements or regulations." A wholly grammatical sentence with this alternate construction would have used "which prohibit" to qualify the plural object of the phrase.

Chart 2: Alternate Construction

[N]othing in this section or in the regulations prescribed under this section shall preempt any State law <u>that</u> imposes <u>more restrictive intrastate requirements or regulations</u>	on	* * * **(B)** the use of automatic telephone dialing systems; [or]
	, or	**(C)** the use of artificial or prerecorded voice messages
	which prohibits--	* * *

Given that both potential constructions have grammatical flaws of a similar magnitude – the confusion of "that" versus "which" or the failure of number agreement between an object and its modifier – neither can be said to produce a *plain*

meaning but likewise neither can be dismissed as plainly *incorrect* given the lack of any fully grammatical alternative. That would seem to be the quintessential situation of ambiguity, which then shifts the focus to other indicia of congressional intent and to the construction favored by the agency charged with implementing the statute. *See* Pet. 6-7 (FCC takes broad view of preemption under the TCPA).

Such a change in focus from plain-meaning analysis to selection between competing constructions of an ambiguous savings clause would yield precisely the opposite result from the decision below.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully Submitted,

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(3)

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Supreme Court of the United States

FREEEATS.COM, INC.,

Petitioner,

v.

STATE OF NORTH DAKOTA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH DAKOTA

BRIEF OF *AMICUS CURIAE* CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PETITIONER

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INTRODUCTION[1]

Since 1934 the Federal Communications Commission ("FCC") has regulated interstate telecommunications while the States generally have had intrastate authority. *See City of New York v. FCC*, 486 U.S. 57 (1988). In the Telephone Consumer Protection Act of 1991 ("TCPA"), Congress authorized the FCC to regulate both interstate and intrastate telemarketing calls but specified, 47 U.S.C. § 227(e)(1), that the Act and implementing federal regulations would

> [not] preempt any State law *that imposes more restrictive intrastate requirements or regulations on, or which prohibits,* – (A) the use of telephone facsimile machines or other electronic devices to send unsolicited advertisements; (B) the use of automatic telephone dialing systems; (C) the use of artificial or prerecorded voice messages; or (D) the making of telephone solicitations. (emphasis added)

An increasing number of States interpret the italicized language to mean that, although States may not impose "requirements or regulations" on interstate calls, they may "prohibit" interstate calls authorized by the FCC. North Dakota law punishes calls using "an automatic dialing-announcing device unless the subscriber has knowingly requested [it] or the message is immediately preceded by a live operator [or the call is] from a public safety agency ... a school district to a student, a parent, or an employee..." N.D. Cent. Code § 51-28-02 (2006). North Dakota applied this law to severely punish an automated interactive political poll conducted from Virginia, a type of interstate communication approved by the FCC. *See North Dakota ex*

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1. All parties have consented to the filing of this brief *amicus curiae* as indicated by letters of consent filed with this Court. This brief was not authored, in whole or in part, by any counsel for any party. No person or entity, other than the *amicus*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief.

rel. Stenehjem v. FreeEats.com, Inc., 2006 ND 84, 712 N.W.2d 828 (2006).

The legal question thus is, did the North Dakota Supreme Court err in holding that, although the TCPA allows States to impose "requirements or regulations" only on intrastate calls, its plain language allows States to "prohibit" interstate calls authorized by FCC regulations. This brief contends that the North Dakota court did err, that there are compelling practical and constitutional reasons to correct that error promptly, and that only this Court is positioned to do so efficiently. Thus, the Petition for Certiorari should be granted.

INTEREST OF THE AMICUS

Interstate telecommunications are vital to American (and global) business. Exclusive federal regulation of the manner and means of interstate calling has provided essential uniformity. *See City of New York.* The FCC determined, after extensive public notice and comment, that some automated or pre-recorded telecommunications encompassed by the TCPA are socially desirable and constitutionally protected.[2] However, the challenged ruling of the North Dakota Supreme Court holds that a cryptic phrase in TCPA – "or which prohibits" – gives States broad new authority to prohibit such federally authorized interstate calls. *See North Dakota ex rel. Stenehjem v. FreeEats.com, Inc.*, 2006 ND 84, 712 N.W.2d 828 (2006). That legally erroneous holding threatens a uniform interstate regulatory structure that has worked well and jeopardizes important economic and constitutional interests of America's business community.

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2. *See* 47 C.F.R. § 64.1200; *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 7 FCC Rcd. 8752 (1992); *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 18 FCC Rcd. 14,014 (2003) ("*2003 TCPA Report and Order*").

The Chamber of Commerce of the United States of America ("Chamber"), founded in 1912, is the world's largest not-for-profit business federation with an underlying membership of over 3,000,000 businesses and business associations. The Chamber's members include businesses of all sizes and sectors - from large Fortune 500 companies to home-based, one-person operations. Ninety-six percent of the Chamber's membership are businesses with fewer than one hundred employees. Collectively, the Chamber's members are central to our nation's economy and well-being.

A key function of the Chamber is to represent the interests of its members in important matters before the courts, legislatures, and executive branches of State and federal governments. In particular, the Chamber has been active concerning the proper scope of federal preemption in regulating interstate commerce. For example, the Chamber was the lead plaintiff in obtaining a declaratory judgment that the TCPA preemption provision at issue here does *not* grant States authority over interstate telecommunications. *Chamber of Commerce of the United States v. Lockyer*, No. 2:05-CV-2257, 2006 U.S. Dist. LEXIS 8234 (E.D. Cal. Feb. 27, 2006) (declaring preempted California's ban on business faxes to persons with a prior business relationship).

Interstate telecommunications of the type TCPA regulates are vital to the Chamber's membership. In 2003, the Federal Communications Commission reported that the telemarketing industry is considered the single largest direct marketing system in the country, accounting for $600 billion in annual sales.[3] The Commission noted that many consumers value the savings and convenience telemarketing provides.[4] In addition, the telemarketing

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3. *2003 TCPA Report and Order*, 18 FCC Rcd. at 14,021-022 (¶ 8) (citing Direct Marketing Association statistics).

4. *Id.* at 14,018 (¶ 3).

industry employs millions of Americans, providing regular, flexible jobs to some of our nation's most economically vulnerable.[5] Moreover, as this case illustrates, the technologies regulated by the TCPA, and threatened by increasing State burdens, extend far beyond telemarketing to core First Amendment speech; e.g. political polling.

The threat to uniform federal regulation of interstate telecommunications posed by the challenged ruling thus is of vital concern to the Chamber's membership and justifies submission of this brief *amicus curiae.*

SUMMARY OF ARGUMENT

Certiorari is justified by the importance of the issue and this Court's unique institutional role in our federal system. State and federal regulation of *interstate* telephone calls using automated and pre-recorded technology have tangled into a knot that only this Court can slice, providing a ruling that both States and federal authorities must accept and restoring the uniformity that has prevailed for decades and that TCPA intended to preserve.

Matters did not have to reach this unfortunate pass. Years ago the FCC recognized that "any state regulation of interstate telemarketing calls that differs from our [TCPA] rules almost certainly would be in conflict with and frustrate the federal scheme and almost certainly would be preempted."[6] And the agency promised "any party that

5. Teleservices jobs employ millions of working mothers, minorities, persons with disabilities, students, part-time workers and residents of rural communities. *See* the Comments of the Direct Marketing Association, Inc. and the U.S. Chamber of Commerce before the Federal Trade Commission, Proposed Amendments to the Telemarketing Sales Rule, FTC File No. R411001, at 5 (Apr. 15, 2002) (citing a WEFA Group Study, *Economic Impact, U.S. Direct and Interactive Marketing Today, 2002 Forecast* and surveys conducted by the DMA), *available at* www.the-dma.org/government/commentsdmauscc.pdf (last visited Aug. 25, 2006).

6. *2003 TCPA Report and Order*, 18 FCC Rcd. at 14,064 (¶ 84).

believes a state law is inconsistent with Section 227 or our rules may seek a declaratory ruling from the Commission."[7] However, as such petitions were filed, the FCC responded with profound paralysis.[8] In the meantime, States have increasingly committed to such regulation.

A dozen States now purport to govern interstate telecommunications subject to the TCPA.[9] The North Dakota and Utah Supreme Courts now have held that TCPA plainly gives States that power. *See North Dakota ex rel. Stenehjem v. FreeEats.com, Inc.*, 2006 ND 84, 712 N.W.2d 828 (2006);

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7. *Id.*

8. *See* Petition for Declaratory Ruling by TSA Stores, Inc., CG Docket No. 02-278 (filed Feb. 1, 2005) (addressing Florida law); Petition for Expedited Declaratory Ruling by National City Mortgage Co. ("NCMC"), CG Docket No. 02-278 (filed Nov. 22, 2004) (addressing Florida law); Petition For Declaratory Ruling of The Consumer Bankers Association ("CBA"), CG Docket No. 02-278 (filed Nov. 19, 2004) (addressing Wisconsin law); Petition of CBA, CG Docket No. 02-278 (filed Nov. 19, 2004) (addressing Indiana law); Petition for Declaratory Ruling by American Teleservices Association, Inc. ("ATA"), CG Docket No. 02-278 (filed Aug. 24, 2004) (addressing New Jersey law); Petition for Declaratory Ruling by Mark Boling, CG Docket No. 02-278 (filed Aug. 11, 2003) (addressing California law). *See also* Verizon Comments in Support of Petition for Declaratory Ruling by ATA, CG Docket No. 02-278 (filed Nov. 17, 2004) (addressing New Jersey law) (for the convenience of the Court, all of the foregoing documents are available electronically on the FCC Electronic Comments Filing System ("ECFS") by typing in the names of the parties, the FCC docket number and the date of filing *at* http://gullfoss2.fcc.gov/prod/ecfs/comsrch_v2.cgi).

9. *See, e.g.*, Alaska Stat. § 45.50.475 (2006); Ariz. Rev. Stat. §§ 13-2919, 44-1278(B)(4) & (5) (2006); Colo. Rev. Stat. §§ 18-9-311, 6-1-302(2)(a) (2005); Fla. Stat. § 501.059 (2006); Ga. Code Ann. §§ 46-5-23 & 24 (2006); Ind. Code 24-4.7-1-1(2006); La. Rev. Stat. Ann. § 45:844.12(6)(c)(2006); Mich. Comp. Laws Ann. § 445.111(j); Minn. Stat. § 325E.27 (2005); Mo. Rev. Stat. § 407.1095(3)(b) (2006); Mont. Code §45-8-216 (2005); N.C. Gen. Stat. § 75-104 (2006); N.D. Cent. Code § 51-28-02 (2006); N.H. Rev. Stat. § 359-E:1(2006); N.M. Stat. Ann. § 57-12-22 (2006); N.J. Stat. Ann. § 56:8-119 (2006); Tex. Util. Code Ann. § 55.126 (2006); and Wis. Stat. § 100.52 (2006). In some of these States, the regulatory authorities have not yet formally confirmed their intent to apply the broad statutory language to *interstate* calls, but the threat is clear.

Utah Div. Consumer Prot. v. Flagship Capital, 2005 UT 76, 125 P.3d 894 (2005). In a case that involved *intrastate* communications, the Eighth Circuit used broad language that appears to support those decisions. *Van Bergen v. Minnesota*, 59 F.3d 1541, 1555 (8th Cir. 1995). On the other hand, the *Lockyer* district court ruled that the TCPA did not grant the States authority over interstate calls.

At this point, if the FCC were to begin declaring State laws invalid – and there is no indication it has the stomach to do so – lengthy and unpleasant federal/State conflict would ensue as State courts grappled with the effect on State law of federal agency declarations they deem contrary to plain Congressional command. Business would be caught in the middle. Types of speech that the FCC found desirable – after notice and extensive comment – would be deterred and both economic and First Amendment interests would suffer. For example, the type of automated interactive political poll at issue here either will not be taken or will be much more costly.[10]

Litigation in the lower federal courts will be similarly prolonged, inefficient, and disruptive. State courts are not bound to follow precedent from federal district courts or courts of appeals except where (e.g., under *Ex Parte Young*, 209 U.S. 123 (1908)) the State is effectively a party. The *Lockyer* declaratory judgment the Chamber recently obtained from a federal district court in California was shrugged off in a single sentence by the North Dakota Supreme Court. *FreeEats.com, Inc.*, 712 N.W.2d at 841. Thus, if this Court declines review, the result will be multiple lawsuits against the States in multiple district courts over a period of years.

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10. It should be noted that this poll and many other types of speech burdened by the State/federal conflict at issue here are not "commercial speech" that some precedent gives reduced protection but, instead, are core First Amendment speech, entitled to the highest level of constitutional protection. Although petitioner is a for-profit business, so is the New York Times. Assuming that the First Amendment allows the general type of regulation at issue here, the speech burdens should be minimized by preserving interstate uniformity.

Only this Court now can settle the issue efficiently – and it can do so with limited burden to itself. Federal regulation of interstate telecommunication is a firmly established background principle. There is no room for a presumption against federal preemption in this field. To the contrary, the presumption should be in favor of exclusive federal regulation of the manner and means of interstate calls. The language of the TCPA permits, and the Federal Communications Act of 1934 as a whole favors, applying that presumption here.

The North Dakota court's belief that TCPA explicitly authorizes States to regulate interstate calls is plain error. The TCPA preemption provision never uses the word "interstate," but speaks only of "intrastate" restrictions. The modifier "intrastate" precedes a series of elements – requirements, regulations, and prohibitions. The general tendency is to apply such a modifier to each element of the series. Nothing in the language or structure of the provision excludes such a reading, though the phrasing is awkward.

Moreover, the nature of the statutory language is inconsistent with an intent to draw a jurisdictional line, which is how the North Dakota court interprets it. TCPA is explicit that the State may impose only *intrastate* "requirements and regulations." If North Dakota were right that it may impose *interstate* prohibitions, then the jurisdictional line would be defined by the terms "requirements and regulations" on one side and "prohibitions" on the other. Yet these terms substantially overlap, and since virtually any requirement or regulation can be given the form of a prohibition, the line drawn would be illusory, and the limitation of the States to intrastate regulations and requirements would serve no function.

Thus, the language and structure of the TCPA do not compel the reading adopted by the North Dakota court but, to the contrary, suggest an intent to preserve the States' historic power to impose more stringent restrictions on

intrastate calls, up to and including prohibiting them. That surely permissible reading accords with the long-standing background principle of exclusive federal regulation of the manner and means of interstate calls. And, if doubt remained, it would be removed by the legislative history, which shows no hint of any intent to grant new interstate authority to the States and, instead, emphasizes the need for interstate uniformity, as the FCC has found.

With a very limited investment of its time and resources, this Court can and should correct an obvious misreading of the TCPA and restore the federal primacy over interstate telecommunications that, since 1934, has provided the conditions for rapid economic and technical development and free communication.

ARGUMENT

Compelling practical considerations undergird the long-settled background principle of exclusive federal jurisdiction over *interstate* telecommunications. TCPA's preemption provision can and should be read as fully consistent with that principle. The North Dakota Supreme Court's holding that the plain language of TCPA expressly allows States to prohibit – but not impose requirements or regulations on – interstate calls authorized by the FCC gives a false clarity to the federal statute and creates serious practical and conceptual difficulties that Congress did not intend.

I. COMPELLING PRACTICAL CONSIDERATIONS LED CONGRESS TO MANDATE EXCLUSIVE FEDERAL JURISDICTION OVER INTERSTATE TELECOMMUNICATION

Since the Federal Communications Act of 1934 ("Communications Act" or "Act"), Congress has committed exclusive jurisdiction to regulate *interstate* communications to the Federal Communications Commission ("FCC"), while, with some exceptions, giving the States exclusive

jurisdiction to regulate *intrastate* communications. 47 U.S.C. § 152. (The exception relevant here is that, in the TCPA, Congress gave the FCC jurisdiction to regulate certain intrastate telemarketing communications under Section 227 of the Act, *see id.* § 152(b)). In this way, the Act generally "divide[s] the world... into two hemispheres - one comprised of interstate service, over which the FCC [has] plenary authority, and the other made up of intrastate service, over which the States ... retain exclusive jurisdiction." *Louisiana. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 360 (1986); *City of New York v. FCC*, 486 U.S. 57, 66-70 (1988); *United States v. Locke*, 529 U.S. 89, 115-16 (2000). Within this regime, the historic understanding is that "[i]nterstate communications are *totally entrusted* to the FCC." *NARUC v. FCC*, 746 F.2d 1492, 1498 (D.C. Cir. 1984) (citation omitted and emphasis added). Certainly there is no historic expectation that States may disapprove means and methods of interstate communication that the FCC has reviewed and approved.

This settled background principle of communications law grows from compelling practical considerations that were recognized in connection with the TCPA itself. Faced with intrusive interstate telemarketing practices that the FCC had not regulated, the States had begun efforts to regulate. The resulting disjointed legal landscape created a "national problem" requiring "federal intervention balancing the privacy rights of the individual and the commercial speech rights of the telemarketer." H.R. Rep. No. 102-317, at 10 (1991). Such inconsistent State rules "frustrate the federal objective of creating uniform national rules" and impose "burdensome compliance costs for telemarketers and potential consumer confusion." *2003 TCPA Report and Order*, 18 FCC Rcd. at 14,064-065 (¶ 84). Congress enacted the TCPA to "protect legitimate telemarketers from having to meet [States'] multiple legal standards." H.R. Rep. 102-317, at 10.

As States such as North Dakota have encroached on the FCC's authority over interstate communications,

prohibiting calls the FCC has approved, the very problems that exclusive federal jurisdiction was designed to prevent have sprouted up. Petitions to the FCC calling for preemption report mounting legal confusion, spiraling costs of systems and training in order to comply with State laws that deviate from FCC rules but that are applied across State lines,[11] high risk of unavoidable error due to the complexities of compliance with balkanized State laws,[12] the inevitable risks of legal liability under State law, and the costs of defense potentially in fifty State courts.[13]

11. *See, e.g., In the Matter of Consumer Bankers Association, Petition for Expedited Declaratory Ruling with respect to Certain Provisions of the Indiana Revised Statutes and Indiana Administrative Code,* Consumer Bankers Association, Petition for Declaratory Ruling [sic] at 5, CG Docket No. 02-278 (filed Nov. 19, 2004) ("In order to comply with both federal and Indiana law, each of the CBA's members would be required to identify those Indiana customers with whom the member's relationship satisfies this Commission's, but not Indiana's, standards for permitting a telemarketing call to a number on the do-not-call list. Each member then would be required to compile a separate 'do-not-call list' for those Indiana customers and train and supervise call center employees in its use. This costly and cumbersome effort would frustrate the Commission's announced policy of avoiding 'inconsistent rules for those that telemarket on a nationwide or multi-state basis' that create 'a substantial compliance burden for those entities.'").

12. *See, e.g., In the Matter of American Teleservices Association, Inc., Petition for Declaratory Ruling with respect to Certain Provisions of the New Jersey Consumer Fraud Act and the New Jersey Administrative Code,* Consumer Bankers Association, Comments in Support of the Petition for Declaratory Ruling at 4-5, CG Docket No. 02-278 (filed Nov. 17, 2004) ("CBA members that wish to comply fully with the New Jersey requirements must [maintain separate scrubbing protocols and calling scripts and reprogram screen prompt systems], thereby incurring greater compliance expenses and risks.").

13. *See, e.g., In the Matter of American Teleservices Association, Inc., Petition for Declaratory Ruling with respect to Certain Provisions of the New Jersey Consumer Fraud Act and the New Jersey Administrative Code,* Reply Comments of the American Teleservices Association at 8, CG Docket No. 02-278 (filed Dec. 2, 2004) ("The most troubling aspect of the litany of inconsistent state restrictions is the risk that attorneys' general will initiate enforcement proceedings based upon their over-restrictive regulations and force telemarketers to defend themselves one-by-one in various state courts...The threat of litigation by attorneys general ultimately translates into reverse preemption by the states.").

Ultimately, Petitioners report, they must deal with the costs of simply not making calls.[14] This result was not the intent of Congress, which found that "commercial freedoms of speech and trade" were important interests and "legitimate telemarketing practices" should be permitted. Telephone Consumer Protection Act, Pub. L. No. 102-243, § 2(9), 105 Stat. 2394 (1991) (S. 1462).

In short, in enacting the TCPA, Congress was not writing on a blank slate. To the contrary, it was legislating in a field with a long history of federal regulation and in which exclusive federal regulation of the means and methods of interstate telecommunication had become a settled background principle. Moreover, it was acting to preserve uniform federal interstate standards. *See 2003 TCPA Report and Order*, 18 FCC Rcd. at 14,064-065 (¶ 84).

II. THE PREEMPTION PROVISION MUST BE READ IN ACCORDANCE WITH THE STRUCTURE, PURPOSE AND HISTORY OF THE TCPA, WHICH REQUIRE EXCLUSIVE FEDERAL JURISDICTION OVER INTERSTATE CALLS

The North Dakota Supreme Court gave no weight to the long history of federal jurisdiction over interstate telecommunications or to the peculiarity of a rule permitting States to prohibit what they cannot otherwise restrict. It believed the TCPA "explicitly stat[ed]" States were free to "prohibit" interstate calls and that this "plain language" was not so utterly absurd as to admit variance. *FreeEats.com, Inc.*, 712 N.W.2d at 837, 840. It further ruled that, if textual ambiguity had existed, the presumption in favor of State authority would require that it be resolved against preemption.

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14. *See, e.g., id.* at 9 ("The impracticality of a state-by-state approach is thus clear – telemarketers will ultimately have to defend themselves in fifty (50) state courts if they can afford to do so. If they cannot, they will be forced to cease initiating calls into states with restrictions that conflict with the Commission's Rules.").

These rulings are erroneous. They misconstrue the admittedly awkward language of TCPA's preemption provision, ignore important structural guidance, and undervalue both the background principle of exclusive federal authority over interstate calls and the oddity of authorizing prohibition but not regulation. The language of the TCPA's preemption provision, in itself, says nothing explicit about interstate calls, and the nature and structure of the provision and the Act favor a reading that preserves the States' broad traditional power to regulate or ban intrastate calls while preserving federal interstate exclusivity. That textural reading is further confirmed by the background principle against which Congress legislated and the TCPA's legislative history.

A. The Language of The Preemption Provision Is Best Read To Preserve The States' Authority To Restrict Or Ban Intrastate Calls Without Granting Them New Authority Over Interstate Calls

The North Dakota court mistakenly described TCPA as "explicitly stating that such state laws [prohibiting certain classes of interstate calls] are *not* preempted." *FreeEats.com, Inc.*, 712 N.W.2d at 837 (emphasis in original). In fact, the word "interstate" does not appear anywhere in TCPA's preemption provision. Instead, TCPA protects from preemption a State law "that imposes more restrictive *intrastate* requirements or regulations on, or which prohibits" certain telecommunications approved by federal law. 47 U.S.C. § 227(c)(1) (emphasis added). The supposed explicit grant of interstate authority relied on by the North Dakota court actually was an inference from the placement of the word "intrastate." That inference was not the only or, indeed, the most plausible way to read the provision's language, much less the Act as a whole.

In the English language, how modifiers affect following elements typically is a matter of judgment guided by expectation and context, linguistic and factual. An initial

modifier "will tend to govern all elements in [a] series." *The Am. Heritage Bk. of Eng. Usage*, ch. 2, p.10 (Houghton Mifflin, 1996); see *Ward Gen. Ins. Servs., Inc. v. Employers Fire Ins. Co.*, 114 Cal. App. 4th 548, 554, 7 Cal. Rptr. 3d 844 (Cal. Ct. App. 2003) ("Most readers expect the first adjective in a series of nouns or phrases to modify each noun or phrase in the following series"); *United States Fid. & Guar. Co. v. Fireman's Fund Ins. Co.*, 896 F.2d 200, 203 (6th Cir. 1990) (it is reasonable to construe the phrase "negligent acts, errors, or omissions" to require that all elements be negligent).

But a wide range of other considerations may control. For example, if a restaurant review refers to "fried green tomatoes, plantains, and yams," the "fried" likely modifies three foods since all often are cooked by frying, but "green" likely does not, since "green yams" would be an empty set. An infinite variety of examples may be invented.

In the TCPA's preemption provision, the modifier "intrastate" is followed by and typically thus would modify three elements - requirements, regulations, and prohibitions. However, the elements are not precisely parallel. This lack of parallelism could reflect a difficulty with prepositions: requirements or regulations typically are imposed "on" an object, while a prohibition usually is "of" an object. But it also could be an effort to signal a separation, making it less likely that the modifier "intrastate" would affect "which prohibits."

The text is further clouded because the phrase concerning prohibition is introduced by "which," while the prior phrase concerning requirements and regulations begins with "that." This difference makes it more difficult to read "which prohibits" as parallel to and independent of the "that imposes" phrase. Indeed, "which" is being "used as a relative pronoun in a clause that provides additional information about the antecedent." *Webster's II New College Dictionary*, 1257 (Kaethe Ellis ed., Houghton Mifflin 1995).

So viewed, "which prohibits" provides more information about the intrastate restrictions dealt with in the previous clause, making clear that the regulation may go so far as to prohibit. But that reading, in turn, is weakened because the plural antecedent ("requirements and regulations") should have produced "which prohibit," not "which prohibits." In short, the bare language of the preemption provision itself does not have a single explicit meaning but calls for further construction.

The nature of the key statutory terms offers important guidance. Requirements, regulations, and prohibitions are closely related concepts, and it can be difficult to distinguish among them. For example, the North Dakota statute at issue, § 51-28-02, allows automatic dialing-announcing devices to be used where: [1] "the subscriber has knowingly requested, consented to, permitted, or authorized" it; or [2] "the message is immediately preceded by a live operator who obtains the subscriber's consent;" or [3] the message is "from a public safety agency notifying a person of an emergency;" or [4] the message is "from a school district to a student, a parent, or an employee;" or [5] the message is "to a subscriber with whom the caller has a current business relationship;" or [6] the message is "advising an employee of a work schedule." The North Dakota court treated this provision as one that prohibits, but it easily could be said to regulate or impose requirements.

Simply stated, it is implausible that Congress would use a series of such overlapping terms to draw a jurisdictional line, confining States to intrastate requirements and regulations but allowing interstate prohibitions. It is much more likely Congress would use a series of such terms to make clear the comprehensive intrastate authority retained by the States: they may impose requirements and regulations up to and including a prohibition on intrastate communications subject to the TCPA. Importantly, this is not an argument that plain statutory text must be set aside to avoid an absurd meaning. *See Church of the Holy Trinity v. United States*, 143 U.S. 457,

459 (1892). Instead, the point is that the nature of the text itself strongly suggests the intended meaning.

Structural analysis points in the same direction. A provision that merely preserves the status quo may well be fairly laconic. On the other hand, a provision intended to work a significant change that is at odds with the general structure of the statute is likely to be more specific.

Congress "does not, one might say, hide elephants in mouse holes." *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 468, (2001); *Gonzales v. Oregon*, 126 S. Ct. 904, 921 (2006); *see FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000) ("Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion.") Before the TCPA was adopted, States had the authority to restrict, regulate, and prohibit intrastate calls of the type TCPA governs, and many had done so. *See* S. Rep. No. 102-178, at 3 (1991), *as reprinted in* 1991 U.S.C.C.A.N. 1968, 1970 (S. 1462) (finding that over forty States had enacted telemarketing legislation). This authority flowed from the overall structure of the Communications Act. From a structural perspective, then, the insertion of the cryptic phrase "or which prohibits" into a sentence that does not use the term "interstate" but, instead, speaks only of "intrastate" authority is not consistent with an intention to grant the States new interstate authority. Instead, such a structure is more consistent with preserving the status quo.

In sum, the TCPA preemption provision does *not* plainly grant States the authority to ban interstate calls that the federal government has approved. Instead, when attention is paid to the text and structure of the provision and the Act as a whole, the meaning is that only the States' intrastate authority is preserved.

B. The Background Principle Of Exclusive Federal Jurisdiction Over Interstate Telecommunication Confirms The Statutory Meaning

The TCPA was not enacted in a vacuum, but is part of a complex regulatory system Congress developed over the decades. For compelling practical reasons, a background principle of U.S. communications law has been federal regulation of interstate telecommunication.[15] The principle is not invariant, but it has persisted, worked well, and been widely accepted. This background principle has a dual significance.

First, the North Dakota court was mistaken in its view that a presumption against federal pre-emption required any ambiguity in TCPA to be resolved to favor State authority over interstate calls. This Court has been explicit that no such presumption is warranted "when the State regulates in an area where there has been a history of significant federal presence." *United States v. Locke*, 529 U.S. 89, 108 (2000); *see Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978). Beyond doubt there has been a history of significant federal involvement in regulating interstate telecommunication.

Second, because federal regulation of interstate telecommunication is not merely significant but general, pervasive, and of long-standing, the presumption actually runs the other way. Although Congress can deviate from such background principles, it is unlikely to do so casually, and that probability shapes this Court's statutory construction. *See United States v. X-Citement Video, Inc.*, 513 U.S. 64, 70-71 (1994) (collecting authority). For example, the

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15. *See, e.g., Cavalier Tel., LLC v. Verizon Va., Inc.*, 330 F.3d 176, 186 (4th Cir. 2003), *cert. denied*, 540 U.S. 1148 (2004) ("The FCC has the responsibility of coordinating the national telecommunications market"); *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 704 (1984) (preempting a State regulation that "plainly reaches beyond the regulatory authority reserved to local authorities by the [Communications Act], and trespasses into the exclusive domain of the FCC.").

"background principle" that evil intent is an essential element of most serious crimes will lead this Court to reject "the most grammatical reading" of a statute, even though that stringent reading poses no "constitutional problems." *Id.* at 69-71 (1994) (collecting authority); *United States v. United States Gypsum Co.*, 438 U.S. 422, 438 (1978) ("more than the simple omission of the appropriate phrase from the statutory definition is necessary to justify dispensing with an intent requirement").[16]

Similarly here, the presumption should be that Congress intended to preserve the background principle of exclusive federal regulation of interstate calls. That presumption strongly confirms the reading just discussed. Indeed, Congress should not be understood to have suddenly and inexplicably changed its long-standing practice without much clearer indications than any fair reading of the preemption provision could provide.

C. The Legislative History Removes Any Doubt

If any substantial doubt remained, it would be eliminated by the TCPA's legislative history. *See, e.g.*, S. Rep. No. 102-178, at 3 (1991), *as reprinted in* 1991 U.S.C.C.A.N. 1968, 1970 (S. 1462) (a *federal* response to abusive interstate calling was deemed necessary "[b]ecause States do not have jurisdiction over interstate calls."). Congress found that "Federal law is needed to control residential telemarketing practices" for the particular reason that "telemarketers can evade [State] prohibitions through interstate operations." Telephone Consumer Protection Act, Pub. L. No. 102-243, § 2(7), 105 Stat. 2394 (1991) (S. 1462).

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16. In *X-Citement Video*, Justices Scalia and Thomas dissented, stating that a background principle could not be employed to give a statute a meaning "its language simply will not bear" unless a scrivener's error was "absolutely clear." *X-Citement Video*, 513 U.S. at 80 (Scalia, J. and Thomas., J., dissenting). They did not question, however, that such a principle may guide the resolution of ambiguity.

As important as these affirmative statements are, there is an equally important silence. If Congress had intended to break with the long-standing background principle of exclusive federal regulation of interstate calls, it surely would have said so. The failure of the hound to bay is, in this case, persuasive evidence that there was no hound. The reason Congress never mentioned giving the States new authority to prohibit interstate communications approved by the FCC is that is had no such intent.

This legislative history, clear enough in its own right, need not be read de novo. The FCC, the expert agency entrusted by Congress to implement the statute, has already closely examined this history, weighed the evidence, and come to a firm conclusion. The Commission found that the "clear intent of Congress" was to "promote a uniform regulatory scheme," and accordingly, State regulation of interstate telemarketing calls that differs from the FCC's rules would "almost certainly . . . conflict with and frustrate the federal scheme and almost certainly would be preempted." *2003 TCPA Report and Order*, 18 FCC Rcd. at 14,064-065 (¶¶ 83-84). An expert agency may reasonably be expected to understand the legislative intent behind amendments to its core statutory authority, and its reasoned assessment deserves some weight.

* * *

As demonstrated above, there are good textual and structural reasons to construe the awkward language of TCPA's preemption provision to preserve the States' traditional broad power to impose requirements and regulations, including prohibitions, on intrastate calls. Any remaining ambiguity can and should be resolved to preserve the strong background principle favoring exclusive federal regulation of interstate telecommunications. This is doubly so since the legislative history stresses the need for a federal solution and does not even hint that States were being granted the new power to overrule the FCC with respect to interstate calls.

CONCLUSION

This petition presents a single, pure issue of federal law that is important to the U.S. economy and that only this Court can efficiently resolve. *Certiorari* should be granted.

Respectfully submitted,

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